1991

ONG International Inc. v. 11th Avenue Co. : Brief of Appellee

Utah Supreme Court

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BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

ONG INTERNATIONAL (U.S.A.) INC., a Nevada corporation; D&D MANAGEMENT, a Utah corporation; and DAVID L. ALLDREDGE, an individual,	:	
Plaintiffs and Appellees,	:	Case No. 910522
vs.	:	Priority No. 16
11th AVENUE CORPORATION, a Utah corporation, f/k/a SALT LAKE MEMORIAL MAUSOLEUM; KEITH E. GARNER, an individual;	:	
Defendants and Appellants.	:	

BRIEF OF APPELLEES

ON APPEAL FROM A FINAL JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH HONORABLE J. DENNIS FREDERICK, DISTRICT JUDGE

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NATURE OF THE CASE

The action was commenced by appellees Ong International (U.S.A.) Inc., D&D Management and David L. Alldredge (collectively Ong International) against appellants 11th Avenue Corporation, f/k/a Salt Lake Memorial Mausoleum, and Keith Garner (the Garner appellants) to rescind as fraudulently induced two agreements entered in connection with a partnership between and among the parties.

The jury returned a unanimous fraud verdict for Ong International, awarding it restitutionary and punitive damages in addition to finding that the agreements should be rescinded. The Garner appellants take this appeal from the final judgment of the District Court dated September 26, 1991.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Garner's statement of the issues is imprecise, and incomplete in light of their failure to marshal. Thus, Ong International reframes the issues appealed and adds the marshaling question.

ISSUE NO. 1:

> **WHETHER THE APPELLANTS' CHALLENGE TO THE FRAUD AND PUNITIVE DAMAGES VERDICT MUST BE REJECTED--ON THE GROUND THAT THEY FAILED TO MARSHAL THE EVIDENCE SUPPORTING THE VERDICT AND PRESENT IT IN THE LIGHT MOST FAVORABLE TO THE VERDICT.**

ISSUE #1(a):

> **WHETHER, IN ANY EVENT, THE VERDICT OF THE JURY OF FRAUD IS SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE UNDER A CLEAR AND CONVINCING TEST.**

Standard of Review:

Under Crookston v. Fire Ins. Exchange, 817 P.2d 789, 804 (Utah 1991), the trial court has broad discretion to deny a Utah R. Civ. P. 59 motion for new trial.

Findings underlying the judgment will not be disturbed "unless evidence on the issue 'so clearly preponderates in favor of the appellant that reasonable people would not differ on the outcome of the case.'" Western Fiberglass, Inc. v. Kirton, 789 P.2d 34, 35 (Utah Ct. App. 1990) (quoting Cambelt Int'l Corp. v. Dalton, 745 P.2d 1239, 1242 (Utah 1987)). This Court may not overturn any verdict that is supported by "substantial and competent" evidence. W. Fiberglass, 789 P.2d at 35.

ISSUE # 2:

WHETHER THE DISTRICT COURT CORRECTLY DETERMINED THAT THE GENERAL RELEASE CONTAINED IN THE FRAUDULENTLY INDUCED REDEMPTION AGREEMENT DID NOT, AS A MATTER OF LAW, ALLOW THE GARNER APPELLANTS TO ESCAPE LIABILITY FOR FRAUD CLAIMS KNOWN TO THEM BUT CONCEALED FROM THEIR PARTNER AND FIDUCIARY, ONG INTERNATIONAL--PARTICULARLY WHEN THE PARTIES NEVER DISCUSSED THE RELEASE OF SUCH FRAUD AND ONG INTERNATIONAL DID NOT INTEND TO WAIVE FRAUD CLAIMS.

Standard of Review:

The clearly erroneous standard of review applies to factual findings regarding intent that are implicit in a verdict. Cf. Sprouse v. Jager, 806 P.2d 219, 221-22 (Utah Ct. App. 1991); W. Fiberglass, 789 P.2d at 35.

ISSUE # 3:

WHETHER THE DISTRICT COURT PROPERLY ADMITTED EVIDENCE OF GARNER'S WEALTH AT THE TRIAL ON LIABILITY, BECAUSE UTAH CODE ANN. § 78-18-1 (REQUIRING FINDING OF LIABILITY FOR PUNITIVE DAMAGES BEFORE ADMISSION OF EVIDENCE OF WEALTH) DOES NOT APPLY RETROACTIVELY TO THIS ACTION.

ISSUE # 3(a):

A RELATED ISSUE IS WHETHER THE APPELLANTS WAIVED THE RIGHT TO APPEAL THE APPLICATION OF § 78-18-1 BY EXPRESSLY STIPULATING AT TRIAL THAT THE STATUTE WOULD NOT APPLY TO THIS ACTION.

Standard of Review:

The question whether a statute applies retroactively is one of law that will be reviewed for correctness. Docutel Olivetti Corp. v. Dick Brady Systems, Inc., 731 P.2d 475, 478-79 (Utah 1986).

ISSUE # 4:

WHETHER THE DISTRICT COURT PROPERLY DETERMINED THAT THE PUNITIVE DAMAGES AWARD WAS PROPER ON THE GROUNDS THAT, UNDER CROOKSTON, THE AWARD IS REASONABLY RELATED TO THE FRAUD COMPENSATORY DAMAGES UNDER A RATIO OF 1/2 to 1.

Standard of Review:

If the ratio of punitive to actual damages should fall within the range this Court has consistently upheld, the trial court may assume the award is not excessive and may deny a new trial without explanation. Crookston, 817 P.2d at 807-11. The appellate court will review the district court's new trial ruling rather than the jury's verdict directly. Id. at 813. The district court's decision to deny a new trial on the relationship of damages ground must be reasonable in light of the law and the facts. Id. at 806.

ISSUE # 5:

WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY MAKING ANY EVIDENTIARY RULING THAT AMOUNTED TO FUNDAMENTAL, REVERSIBLE ERROR.

Standard of Review:

A trial court's rulings on the admissibility of evidence will not be reversed absent an abuse of discretion affecting a party's substantial rights. Erickson v. Wasatch Manor, Inc., 802 P.2d

1323, 1325 (Utah Ct. App. 1990) "A substantial right of a party is affected if, viewing the evidence as a whole, there is reasonable likelihood a different result would have been reached absent the error." Id.

ISSUE # 6:

WHETHER THE DISTRICT COURT MANIFESTLY ABUSED ITS DISCRETION IN ITS AWARD OF UTAH R. CIV. P. 54(d) COSTS TO ONG INTERNATIONAL FOR FILING FEES, WITNESS FEES AND DEPOSITION FEES.

Standard of Review:

The district court's award of costs is presumed correct absent a clear abuse of discretion. Lloyd's Unlimited and Nature's Way Marketing, Ltd., 753 P.2d 507, 512 (Utah Ct. App. 1988).

DETERMINATIVE STATUTE

Ong International asserts there is no determinative statute for two reasons: first, because Utah Code Ann. § 78-18-1(2) (1992) does not apply retroactively to this action, and second, by their stipulation, the appellants have waived application of that statute.

STATEMENT OF THE CASE AND COURSE OF THE PROCEEDINGS

Ong International concurs with the appellants' statement of the case with certain exceptions--the first of them glaring. The appellants state that the district court incorporated the entire special verdict into the final judgment. That is fundamentally false. To avoid duplication of damages, Ong International voluntarily withdrew from the final judgment the following parts of the jury verdict: (1) under interrogatory IV.A.1--$447,034.00 awarded against Garner individually for fraud damages; (2) under interrogatory V.1.--$70,000.00 awarded against SLMM/11th Avenue for

breach of fiduciary duty; and (3) under interrogatory V.2.--$512,000.00 awarded against Garner for conversion of assets. (R. 5:01923-28)

Second, by timely notice of August 4, 1991, Ong International elected against SLMM/11th Avenue the remedy of rescission. (R. 3:1208-11) As to Garner, the appellants stipulated that any damage award would be equally applicable to Garner and SLMM/11th Avenue.

Third, in its Memorandum Decision, dated November 13, 1991, the district court denied the Garner appellants' motions for judgment n.o.v. or for new trial based on the reasons set out in Ong International's opposing memoranda. (R. 6:2532-38) The court also enunciated its reasons for not disturbing the punitive damage award, after acknowledging that such enunciation was not necessary, because the award bore a reasonable and rational relationship to actual damages under this Court's guidelines in Crookston, 817 P.2d at 807-13. (R. 6:2534).

STATEMENT OF FACTS SUPPORTING THE VERDICT

The appellants have failed totally to meet the requirements of Utah R. App. P. 24(a)(7) and controlling case law that their brief marshal the complete facts relevant to the issues presented for review and to state them in a light most favorable to the verdict. Therefore Ong International sets out the facts and evidence which are material to the review and which support the jury's unanimous fraud verdict.

1. Alldredge Develops Trust in Garner.

The mortar of the fraud in this case was first mixed in 1965 when David Alldredge first met Keith Garner. Alldredge was a young member of the Church of Jesus Christ of Latter-day Saints (the

L.D.S. Church) serving in Hong Kong as a proselyting missionary from 1963 through 1965. (Tr. I:2927-28) Garner was the president of the Hong Kong mission for the last leg of Alldredge's mission. (Tr. I:2930) While serving as Garner's assistant, Alldredge developed a close relationship with him, and lived in the mission home with Garner and his family. Id.

Through Garner, Alldredge became acquainted with Elder Marion D. Hanks, an L.D.S. general authority who presided over the region encompassing Hong Kong. (Tr. I:2932-34) Alldredge considered it "thrilling" to be able to interact with Elder Hanks, and developed great respect for the person and his position (Tr. I:2934-35), Hanks being a "man of integrity" who was "chosen by leaders of the church to serve [his] mission." (Tr. I:2935)

After returning from his mission and completing his education, in approximately 1971, Alldredge was employed by First National Bank of Chicago as a commercial banking officer. (Tr. I:2937) His position required him to live and travel extensively in Asia. Id. In 1985 he joined the International Bank of Asia in Hong Kong as the general manager responsible for commercial banking activities. (Tr. I:2938)

2. The Garner Appellants' Contractor Knows Nothing About Building Mausolea, and Misrepresents the Crypt Construction to Governmental Agencies.

For the past thirty years, Garner has been a commercial and residential land developer principally in California. (Tr. V:3644-46) In 1975 Garner moved from California to Utah and began developing in the state. (Tr. V:3648) For Garner's Utah projects he used Robert Ord exclusively as the contractor and Arnold

Fluckiger principally as the architect (Tr. V:3648), both of whom are longtime friends of Garner (Tr. III:3353-59; IV3497-99).

In 1979 Garner purchased and took control of the Salt Lake Memorial Mausoleum (SLMM) from Coy Miles (Tr. V:3349), which is located at 1001 11th Avenue in Salt Lake City, Utah (Tr. IX:4582) The Mausoleum consists of one main building that was constructed in the 1920s and contains crypts for the entombment of caskets, all of which are located indoors and constructed entirely of poured-in-place concrete. (Tr. I:2881-82; IV:3612)

In 1984 Garner retained Fluckiger to draw plans for an outdoor mausoleum pavilion, consisting of five structures called "pods," designed to house 102 crypts each. (Tr. III:3366-67) The crypts are located on three walls of a pod with the fourth wall constituting the open-air entrance to the pod. (Exh. 110)

Fluckiger had known Garner through the L.D.S. Church since 1955 and had worked on several projects for him. (Tr. III:3353) Garner had previously retained Fluckiger to design a new wing of concrete crypts for the indoor mausoleum, which project never materialized. (Tr. III:3362, 66) The outdoor pavilion drawings, plans and cost estimates Fluckiger submitted to Garner expressly stated and envisioned the use of concrete crypts. (Tr. III:3360-65)

On April 30, 1984, Fluckiger requested a zoning variance from the Salt Lake City Board of Adjustment to construct the outdoor pavilion consisting of five pods of concrete crypts containing 102 crypts per pod or a total of 510 crypts. (Tr. IV:3508, 3484) The drawings Fluckiger submitted with the request contained the notation "CONC crypts." (Tr. III:3393; Exh. 50) "CONC" stands for

concrete. Id. Attached to the variance request was a commercial brochure advertising, depicting and describing high quality pre-cast concrete crypts. (Tr. III: 3378-79, 82; Exh. 45) The drawings also contained the notation, "PVC 3," which indicated a type of pipe used for ventilation. (Tr. III:3394-95) Fluckiger drew the plans requiring concrete and a ventilation system. (Tr. III:3395) The estimated cost per pre-cast concrete crypt was $750.00. (Tr. III:3398)

Two months later, on July 10, 1984, the Salt Lake City Building Department issued the permit based on Fluckiger's submitted documents and building plans showing pre-cast concrete crypts. (Tr. IV:3477, 79, 84)

Appellants began building the outdoor pavilion around August 1984, but did not complete it until sometime in 1987. (Tr. VII:4445-46) Without giving a reason, Garner (Tr. IV:3526-27, 30) told Ord to depart from the architect's plan for concrete crypts and to use wood. (Tr. IV:3518-19) Ord did so at Garner's express instructions. (Tr. IV:3518) Ord had never designed a wooden crypt. (Tr. IV:3528) He knew nothing and consulted no one (Tr. IV:3528) about mausoleum crypt construction, wood selection or wood treatment. (Tr. IV:3526, 30)

With Garner's knowledge, Ord drew his own new plans for wood crypts. (Tr. IV:3528) The crypts were built without a drainage system (Tr. IV:3539), which was absolutely contrary to health and industry standards (IV:3540-41). Fluckiger never knew his concrete crypt design was altered. (Tr. III:3361)

Ord never notified the relevant public officials that he had changed the plans for the crypts from concrete to wood. (Tr.

IV:3511) He later destroyed all his records related to the crypts, including building plans, specifications, cost estimates, inspection reports and financial accounts. (Tr. IV:3515)

Ord had been with Garner since the 1950s and testified, "He is the best friend I have." (Tr. IV:3498-99)

3. Salt Lake City Revokes The Building Permit.

The City building inspector, Richard H. Ith, inspected the outdoor pavilion construction approximately eight times. (Tr. IV: 3485) On January 9, 1987, the building permit was revoked and voided (Tr. IV:3485-86), due in part to the fact that the Mausoleum had not received Board of Health approval for the construction and use of wooden crypts (Tr. IV:3490). To the date of trial, Salt Lake City had not issued a certificate of occupancy or a final building inspection certificate for the outdoor pavilion. (Tr. IV:3486)

4. Garner's Motive for Constructing Wood Versus Concrete Crypts Is Clear -- A Savings of Over $400,000.

The trial testimony was that by constructing the wood crates rather than the planned concrete crypts for the outdoor pavilion, Garner achieved a considerable cost reduction. Garner acknowledged that the cost of wood construction was less. (Tr. V:3695-98) The unrebutted testimony was that Garner saved $409,100.00 by changing from the originally planned concrete crypts to plywood and chipboard. (Tr. VII: 4163-70; Exh. 89a) (See Attachment 1) The construction period of the outdoor crypts coincided with a period from 1982 through 1988 during which the Mausoleum lost over $450,000 from its operations. (Tr. V:3698)

5. The Missionary Acquaintance of Garner and Alldredge is Renewed in 1986.

In November 1986 Alldredge renewed his relationship with Garner at a B.Y.U. football game (Tr. I:2939-40), Garner being in the company of Elder Hanks in the VIP box (Tr. I:2940).

Garner told Alldredge about his construction projects, including the first high rise apartment complex in Palo Alto, California. (Tr. I:2941) Garner said he had "made a lot of money." Id. He also related his post-mission L.D.S. Church positions, such as regional representative and president of Temple Square in Salt Lake City, and said he was the best of friends with "Duff" Hanks. Id. The fact Garner had been called to those high church positions "only increased [Alldredge's] esteem for him and [his] belief in [Garner's] integrity." Id.

After learning Alldredge was a Hong Kong banker, Garner asked him if he could find an Asian investor for Garner's real property (Roundhouse) project in Arizona. (Tr. I:2940, 43) Upon returning to Hong Kong in November 1986, Alldredge talked to a prominent bank customer, Ong Ka Tai of Ong and Company, Ltd. of Hong Kong about Garner, his success and the Roundhouse project. (Tr. I:2943A-45) Alldredge told Ong he had great respect for Garner (Tr. V:3802), and Ong became interested in meeting him (Tr. I:2946), because Ong was "working on the assumption that the potential partner" was "an experienced contractor," a "successful developer" and a person of good "moral and ethical conviction" (Tr. V:3816).

In negotiations, Garner told Ong he was very active in the L.D.S. Church and was of unquestioned integrity as evidenced by the

secular and ecclesiastical "experience" resumes Garner sent to Ong. (Tr. V:3816-17) (See Attachment 2).

6. Ong and Alldredge Meet Garner in Salt Lake City to Discuss the Roundhouse Project.

In March 1987, Garner made Ong International a written proposal (Tr. I:2947) to which Ong responded by traveling with Alldredge to meet Garner in Arizona for an inspection of Roundhouse. (Tr. I:2948; V:3802) Alldredge was working on his bank's behalf, and personally received no fee for his efforts related to the Roundhouse project. (Tr. I:2948-49) Garner stood them up in Arizona, so Ong and Alldredge continued their planned trip to Salt Lake City, where Garner wanted to show them his "home base." (Tr. I:73:2950) It was Ong's first trip to Utah. (Tr. I:2952)

From the balcony of Garner's home located at 1200 North 1100 East, Salt Lake City, he showed Ong and Alldredge a "fantastic" view of Salt Lake Valley, including the Mausoleum which was not far away. (Tr. I:2953) The three continued the Roundhouse discussions, discussed religion and toured Garner's posh home, complete with an elevator and an Olympic-size swimming pool. (Tr. II:2973) After 4-6 hours chez Garner, Ong and Alldredge flew back to Hong Kong, but not before Garner took them on a quick spin past the homes of L.D.S. officials Elder Hanks and President Gordon B. Hinckley--which Garner built. (Tr. I:2962; II:2974)

A short time later Alldredge received a letter from Garner quoting scripture (Tr. II:2981) and stating that he specialized in "visions." (Tr. II:2930). See Exh. 23. Garner said he believed the parties had "concluded a mutually acceptable vision with qualified and realistic dreams for the future." Id.

7. Ong International Enters the Roundhouse Agreement with Garner.

In July 1987 Ong entered an agreement with Garner concerning the Roundhouse property. (Tr. II:2983) (The Roundhouse deal subsequently turned out to be a failure, and Ong International got out of it. (Tr. V:3827)) Garner did not mention investment in the Mausoleum until November 1987, when he called Alldredge in Hong Kong to see whether Ong would be interested. (Tr. II:2984; V:3808)

8. Garner Approaches Ong International about Investing in the Mausoleum.

By letter dated November 3, 1987, Garner formally invited Ong to invest in the Mausoleum, stating that Elder Hanks owned 25% of the Mausoleum stock, but would sell it to Ong. (Tr. II:2986)

Garner proposed that Ong invest $700,000 to acquire 50% of the Mausoleum--an amount that would purchase Hank's stock and pay off Mausoleum debts. (Tr. II:2989) Garner also promised Ong and Alldredge "skyview" vacant residential lots adjacent to the Mausoleum, on which he would build them homes at cost. (Tr. II:2987) Since Ong International was looking for an investment in the United States, Ong was willing to explore the Mausoleum proposal. (Tr. V:3811)

9. Garner Makes his Pitch.

In December 1987 Alldredge, still representing his bank, returned to Salt Lake to view the Mausoleum for client investment potential. (Tr. II:2990, 93-94) Garner showed Alldredge through the indoor Mausoleum, focusing on the model crypt and stating that, in addition to the qualities of drainage and permanency, it was "waterproof," "fireproof," "earthquake proof" and "sealed tightly." (Tr. II:2997)

When Garner took Alldredge out to the pavilion, they did not walk inside the individual pods; instead they looked at them through the iron gate. (Tr. II:2998) Alldredge testified Garner told him the outdoor crypts were the same as the model crypt--"made of solid concrete" and were "fireproof." (Tr. II:2998, 3001) Upon returning to Hong Kong, Alldredge related to Ong and the Ong International Board of Directors all that Garner had represented about the Mausoleum and crypts. (Tr. II:3003-06)

In March 1988 Garner and his secretary, Susan Stewart, traveled to Hong Kong and Singapore to discuss Ong International's investment in the Mausoleum. (Tr. V:3814; Tr. IX:4631-32, 40)

One month later, in April 1988, Ong and his wife flew to Salt Lake and received a tour of the Mausoleum, a high point of which was the indoor model concrete crypt together with all the usual representations that the crypt had adequate drainage and ventilation and was fireproof, earthquake proof, etc. Garner also took the Ongs on the celebrity crypt run past the crypts allegedly owned by Marion Hanks et ux., the Osmonds, and "the personal dentist of the number one man in the L.D.S. Church." (Tr. V:3821-22)

Garner told the Ongs the outdoor crypts were of the same standards as the model crypt--earthquake proof, fireproof and waterproof--a good project for the next two hundred years of Ong's posterity. (Tr. V:3823-24) Garner did not mention the fact there was wood in the outdoor crypts. (Tr. V:3825)

10. Garner's Elder Hanks Stories were Deceptions Intended to Induce Ong International's Infusion of Capital to Pay Off Mausoleum Debts and to Persuade the Believing Public to Buy Wood Crypts.

Elder Hanks testified at trial that he had never owned stock or an interest in the Mausoleum and was never involved in its operations. (Tr. V:3738, 40-41, 45) He was not aware that Garner had listed him in any written documents as owning Mausoleum stock. (Tr. V:3741) Elder Hanks had lent $75,000.00 to a friend Coy Miles, the previous mausoleum owner, and Miles had insisted that Hanks hold a paper evidencing Miles' share in the corporation (the two pushed the paper back and forth over Hanks' desk). (Tr. V:3738-39) The Miles loan was paid off by the funds Garner received from Ong International's later capital investment. (Tr. V:3745-47)

Elder Hanks had not authorized anyone, including Garner, to use his name in promoting the sale of Mausoleum crypts or the Mausoleum itself. (Tr. V:3741-42, 45) Hanks testified it would be a "disappointing surprise" if his name were so used. (Tr. V:3741)

Neither Elder Hanks nor his wife had ever owned a crypt at the Mausoleum, and had never committed themselves to owning one. (Tr. V:3742) In October 1988, without Hanks' having requested or anticipated it, the Mausoleum sent him a gift certificate for two crypts. (Tr. V:3742-43) Out of courtesy Hanks did not return the certificate, since his wife and he had no intention to be interred in the Mausoleum, but rather, fully intend to be buried in their own plot at the City Cemetery. (Tr. V:3752)

11. The Joint Venturers Enter a Partnership Agreement.

In reliance upon the representations of Garner as to the Mausoleum and the nature and construction of the outdoor pavilion, the parties entered into a partnership agreement to own and operate the Mausoleum evidenced by a document entitled "Salt Lake Memorial Mausoleum General Partnership Agreement." (Tr. II:3014) Ong International paid $800,000 in cash for a fifty percent (50%) interest in the partnership. (Tr. VI:3878; II:3014; III:3232) The $800,000 cash infusion permitted Garner to repay a note payable to Tracy Collins Bank in an amount in excess of $487,000.00. (Tr. V:3698-99; Exh. 28) The partnership included D&D Management, Mr. Alldredge's management corporation. (Tr. VI:3878 and Exh. 28) The partnership assigned D&D Management the specific responsibility to manage the Mausoleum.

In the summer of 1988, Alldredge resigned his banking position and moved his family to Salt Lake City so he could manage the Mausoleum. (Tr. I:2926; II:3026) Garner, however, refused to relinquish control and management of the Mausoleum to Alldredge. (Tr. II:3035) Contrary to the terms of the partnership, Garner refused to allow Alldredge to make decisions or write checks and denied Alldredge access to partnership records. (Tr. II:3035, 42) Alldredge was not consulted on anything.[1] (Tr. II:3042)

12. Ong International Buys out Garner's Partnership Interest.

The partners ultimately agreed to terminate the partnership by entering a partnership redemption agreement, dated February 28,

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[1]The situation hit such a nadir that, more than once, Garner's secretary, Ms. Stewart, sat Alldredge down to tell him Garner had never had a partner and if Alldredge did not quit acting like one, she would ship him back to Hong Kong, in Alldredge's words, "just like that." (Tr. II:3036)

1989, and signed in March 1989. (Tr. II:3049). Under the terms of the redemption agreement, SLMM transferred to Ong International all its remaining interest in the Mausoleum for $400,000. (Tr. II:3050) SLMM then changed its name to "11th Avenue Corporation." (Tr. IX:4582)

13. Ong International Did Not Intend That the General Release in the Redemption Agreement Release Undisclosed Fraud Claims.

At no time leading up to the redemption agreement did Garner or anyone else for that matter, make any statements to Ong or Alldredge regarding the wood construction of the outdoor crypts. (Tr. II:3050, 51) Consequently neither Ong International nor D&D Management had any reason to suspect the construction of the outdoor crypts was anything less than the indoor concrete crypts, that Garner represented. (Tr. II:3059)

Had Ong International known of the crypts' shoddy construction, it would have never signed the redemption agreement. (Tr. V:3829-30) Indeed, Ong International would have never become involved in the partnership initially, "not to mention increase[ing] [its] stake" in the venture. (Tr. V:3830)

Ong International and D&D Management did not intend to release anyone or any entity from fraudulent omissions or misrepresentations of material facts such as the construction of the outdoor crypts. (Tr. II:3059) Incident to signing the redemption agreement, neither the parties nor their counsel discussed the release of undisclosed fraud claims. (Tr. VIII:4485-90)

14. Garner Leaves the Mausoleum Permanently.

After entering the redemption agreement, Garner packed up and moved off the Mausoleum property. The morning after Garner's exit,

April 3, 1989, Alldredge found the Partnership computer sitting on the office floor with all accounting and bookkeeping records erased from the hard drives and no software to be seen. (Tr. II:3092) Alldredge was required to hire a professional accounting firm to reconstruct the records from an earlier balance sheet and some financial statements. (Tr. II:3093)

15. <u>Alldredge Discovers the Crypts are Wood</u>.

In May 1990 Alldredge began listing Mausoleum needs and leftover Garner problems in preparation for seeking expert advice on developing eight acres of the property. (Tr. II:3061-62) While in that process, he recalled that previously one of his employees, Jeri Stevens, had told him "there might be some wood out there, meaning the outdoor pavilion." (Tr. II: 3062) Alldredge decided to investigate whether there was wood in the pods.

It is difficult to remove the tightly fitted marble facia from the crypts--the job requires a hired crew to use two sets of large suction cups and scaffolding (to reach the upper crypts). (Tr. II:3061, 64) Alldredge decided to hire a crew to remove the marble facia in May 1990. (Tr. II:3065) When the facia had been taken off several of the crypts, he was shocked and infuriated to discover the crypts were made of plywood two-by-twos and two-by-fours--many of them warped. (Tr. II:3065-66) Of the 510 crypts contained in the five pods, Alldredge discovered that those in pods 2, 3 and 4 were constructed entirely of wood and those in pods 1 and 5 were a mixture of wood and concrete. (Tr. II:3066, 79-83) Only the crypts in the first three levels of pod 1 were completely concrete--and they were cracked. (Tr. II:3067)

The great bulk of wood crypts had no ventilation or drainage, and those that did merely had holes bored in the wood which allowed gas from one crypt to escape to another and body fluids to drip onto the caskets below.[2] (Tr. II:3067) There was no recess to allow a tight plexiglass seal pursuant to Fluckiger's plans and industry standards. Id.; see Exh. 9-11.

After the discovery Ong International did nothing with the Mausoleum, because, upon consulting with Mausoleum experts, it discovered it could not sell wood crypts. (Tr. II:3096) Of the outdoor crypts, 185 had been sold and 15 contained entombed remains. (Tr. VI:3975)

In August 1990, after removing enough facia to discover the extent of the wood crypts, Alldredge notified the mausoleum insurance agents, Alfred Landvatter and Steven Nielson, that rather than being entirely concrete as previously represented, most of the crypts were made of wood. (Tr. II:3077)

16. The Wood Crypts Were Valueless and a Liability.

Ong International's mausoleum expert, James C. Milne, is an internationally qualified structural engineer who specializes in the design and construction of community mausoleum buildings. (Tr. IV:3558) He has constructed hundreds worldwide and owned many mausolea. (Tr. IV:3567)

Milne testified:

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[2]Ong International's expert, Clarence G. Newlon, is a mortician who testified that embalming fluid remains in the body until entombment, after which it solidifies and turns to gas. (Tr. VI:3905) Formaldehyde, a commonly used embalming fluid, does not evaporate and remains in the entombed body. (Tr. VI:3907) Escaping body fluids can corrode even metal caskets. (Tr. VI:3909) Furthermore caskets that are not properly sealed emit an offensive odor. (Tr. VI:3908-09)

(a) That he was "appalled" to discover the crypts were created of "chipboard and plywood and lumber." (Tr. IV:3599) He had never seen any in the United States or Canada. Id. The crypts had no proper ventilation or drainage systems whatsoever. Id.

(b) That the standards for mausoleum construction, which vary little from state to state (Tr. IV:3584-85), require that crypts have, inter alia, drainage, ventilation and an air-tight seal. (Tr. IV:3575-76) Drainage systems are necessary to allow corrosive body fluids to drain from the crypt. (Tr. IV:3596)

(c) That the wood crypts lacked recesses for "proper sealing" against insects and odors. Id. There was no proper way to mount the marble facings. Id. The crypts themselves were too short and narrow to meet industry standards. (Tr. IV:3602) The inferior woods used violate the Uniform Building Code, because they are too weak to support reinforced concrete. (Tr. IV:3619) In two or three of the crypts, the wood was already starting to bow. (Tr. IV:3626)

(d) That in addition to the "practical aspect" of being a place for entombment, a mausoleum must be designed to give comfort to people who are "sensitive and emotionally disturbed at the time of death." (Tr. IV:3574) The wood crypts are unsalable, among other reasons, because they are not perceived as appropriate entombment. Id.

(e) That he compared the discovery of wood crypts to "buying a beautiful new house with plastered walls and then learning that the structural studding had been built out of cardboard." (Tr. IV:3601)

(f) That using Salt Lake standards, Milne estimated $522,698.00 as the cost to bring SLMM up to standards by replacing the wood crypts with concrete crypts. (Tr. IV:3605) Milne estimated $676,238.00 ($573,238.00 reconstruction plus $103,000.00 demolition) as the cost to rebuild the outdoor pavilion from the ground up. (Tr. IV:3609-10)

Ong International's expert, Cramer J. Stiff, was a consultant sales contractor for cemeteries, mausolea and funeral homes. (Tr. VI:3950) He had extensive field work in Utah, Kansas, Florida and California. (Tr. VI:3953) Stiff has been responsible for developing sales programs for mausolea. (Tr. VI:3954-55)

In all his travels and experience, Stiff had never heard of the existence of a wooden crypt in the United States. (Tr. VI:3973)

Stiff testified that the important factor in crypt sales is "peace of mind." (Tr. VI:3961-62, 65) Had the outdoor crypts been built of concrete as represented, they would have been highly salable (Tr. VI:3965),[3] but in their current condition they "absolutely" could not be sold, because there could be no promise of "perpetuity" or "peace of mind." (Tr. VI:3971) Sales of the indoor crypts would also drop, because the current "stigma" or "stain" on the outdoor pavilion would cast doubt on the truth of the representations about the indoor Mausoleum. (Tr. VI:3972)

Stiff's recommendation for the Mausoleum's future was to tear the outdoor pavilion down and start over. (Tr. VI:3974) To facilitate reconstruction, the Mausoleum would be required to obtain consent agreements from each of the 185 crypt purchasers, as well as with the families of the 15 whose remains are already entombed in the crypts, which remains would have to be transported by hearse for temporary storage and re-interment in another mausoleum. (Tr. VI:3975-78) Special problems would arise should the bottoms have rotted from wooden caskets or the handles have fallen off. (Tr. VI:3975-77) Of course the same problems arise on the return trip, particularly after further deterioration has occurred. (Tr. VI:3978) That entire process is complicated and costly. (Tr. VI:4007-10)

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[3]Stiff estimated sales of properly constructed concrete crypts at 200 for the first year (Tr. VI:3970), which was the figure Garner gave Ong International as an incentive to enter into the partnership (Tr. V:3832).

William Lang, MAI, an independent fee appraiser called by Ong International testified that the Mausoleum had a negative net worth of $819,036.00. (Tr. VI:4063) Mr. Lang is a certified general appraiser with a particular interest in unique or special properties. (Tr. VI:4038) He employed approaches to value ordinarily and customarily employed by appraisers with emphasis on the income approach. (Tr. VI:4049) The appellants offered no evidence to rebut Mr. Lang's conclusions.

Ong International's experts all said the property was unsalable, and Ong considered it "tainted with scandal." (Tr. V:3831)

17. The Garner Appellants' Crypt Salespersons fell Prey to the Fraud--but the True Victims were the Unsuspecting Customers.

In 1981-82 Sandra Lenois worked for a firm that marketed products at the Mausoleum (Tr. VI:3916), then from 1983-85 for the Mausoleum itself (Tr. VI:3919). Lenois started by putting together sales mail-outs inviting the public to take tours of the Mausoleum, and later became the sales manager. (Tr. VI:3919-20)

The first stop on the standard tour was at the indoor model crypt, where the sales representative would flip on the light and show how body gasses and fluids escaped through the ventilation piping. (Tr. VI:3922) The tour continued past the purported luminary crypts of the Hanks, the Osmonds, the Utah Jazz and other names Lenois could not remember. (Tr. VI:3923)

A large number of the outdoor crypts were sold before the pavilion was actually constructed. (Tr. VI:3923) The customers were taken to the plot where the pavilion was "staked out." (Tr. VI:3931) They were shown artists drawings and told the outdoor

crypts would be just like the indoor, except the customers could choose from three different types of marble facia. (Tr. VI:3924)

In late 1984 or early 1985, Lenois became concerned about the construction of the outdoor pavilion, because it was behind schedule, customers were complaining and she was not getting the answers she needed. (Tr. VI:3926) Garner told her to talk to Ord (Tr. VI: 3928), who said the delays resulted from "the fact that the crypts were being precast and prestressed in some other state." (Tr. VI:3929) Lenois did not believe him. (Tr. VI:3930) In fact no precast concrete crypt, in or out of state, was ever a part of the outdoor mausoleum. (Tr. V:3770) When she related her concerns to Garner, he said not to worry because he owned Ord Construction. (Tr. VI:3931)

In 1984 James O. Cummings and his wife Joyce were interested in buying a crypt, because the 1983 floods had destroyed some graves in Bountiful and other places. (Tr. VI:4019) A Mausoleum sales representative took the Cummings on a tour of the indoor mausoleum which included a turn past the alleged Hanks and Osmond crypts. (Tr: VI:4021)

Cummings and his wife had purchased crypts in what they were told would be a second story to the existing mausoleum, and they were very angry when they later found they had been transferred to the outdoor pavilion. (Tr. IV:3935) Their concrete crypts were to be in pod 3 of the yet to be constructed outdoor pavilion. Cummings did not know pod 3 was to be constructed of wood. (Tr. VI:4022)

The Cummings were told the outdoor pavilion would be comparable to the existing mausoleum "as far as quality, durability, that

type of thing." (Tr. VI:4023) In response to Cummings' complaints, Lenois sent him a letter from the Garner appellants, dated May 3, 1985, using information Ord gave her to explain the delay in construction: "The interlocking crypts are being precast and prestressed at this time before installation." (Tr. VI:3935, 4025; see Exh. 70)

Cummings interpreted the letter to mean the crypts were being constructed definitely of concrete and possibly of steel. (Tr. VI:4025) The first word Cummings heard about wood crypts came from Alldredge about one year before trial (which would be August 1990). (Tr. VI:4025)

Lenois was also concerned about the sales presentation she was making to potential customers. (Tr. VI:3935) Garner personally reviewed the written sales pitch and took the standard tour with Lenois. His only comment was not to be too morbid when talking about the model crypt. (Tr. VI:3937-37A) Garner did not tell her to include information about the differences between the indoor and outdoor crypts. (Tr. VI:3937A)

Cummings and his wife would have never purchased the wood crypts had they been aware of their construction. (Tr. VI:4026)

18. The Garner Appellants Defrauded their Insurance Company.

In late 1986, Steven R. Nielson, a commercial insurance agent, met Garner through an insurance broker, Alfred Landvatter (Tr. V:3761), and had several meetings with him, lasting from 45 minutes to 1-1/2 hours (Tr. 3762A-64). Garner said Nielson would have a chance to bid on the Mausoleum project. (Tr. V:3763) During Nielson's second meeting with Garner, they toured the indoor Mausoleum, Garner commenting that it was "solid concrete" and

"built like a bunker." (Tr. V:3765) Nielson was impressed by the construction of the old indoor mausoleum and could tell it was built of poured in place concrete. (Tr: V:3766) Nielson also received the crypts-of-the-stars speech from Garner. (Tr. V:3769)

Garner then walked Nielson to the outdoor pavilion, where Nielson could see that the crypts had not been completed. (Tr. V:3770) The bottom two rows of pod 1 were constructed of concrete poured in place by use of wooden framing. (Tr. V:3370) Nielson had a "lengthy" conversation with Garner regarding the outdoor crypt construction, in which he stressed that all wood must be removed after the concrete was poured, since he was in the process of preparing his insurance bid for the mausoleum policy. (Tr. V:3770A, 3771) Garner responded, "Yes, there will be no problem. This building will meet or exceed the standards of the old building." (Tr. V:3771) In reliance on Garner's statements concerning the construction of the outdoor crypts, Nielson completed the risk analysis, then bid and issued an insurance policy on the outdoor crypts as all concrete constructions. (Tr. V:3771-73)

In June 1987, Nielson returned to the mausoleum (after two or three meetings with Garner in the interim) to inspect the crypts. (Tr. V:37773-5) Nielson was perplexed when he saw that marble facia covered the crypts in all five pods, because he could not understand how Garner could have completed the poured in place concrete crypts that quickly. (Tr. V:3775) Nielson first talked to Ord who said everything "had been all taken care of." (Tr. V:3776-78)

In Ord's presence, Nielson asked Garner whether the work had been completed and the concrete had been cured. (Tr. V:3778-79) Garner said everything was fine and the work had been completed. (Tr. 3779) When Nielson expressed concern about drainage, Garner showed him the model crypt's drainage system. (Tr. V:3780) On the strength of the inspection, Nielson renewed the Mausoleum insurance (on all-concrete crypts) with the same company, and later renewed it again. (Tr. V:3781) At the time of the later renewal, Nielson asked Garner pointblank whether the outdoor crypts contained any wood, and Garner answered, "'No.'" (Tr. V: 3785) Nielson learned that Garner had lied about the crypt construction only after Alldredge called him, in a state of alarm, to tell him of the wood discovery and to seek his insurance advice. (Tr. II:3077; V:3786)

At trial Garner flatly denied ever having met Nielson (Tr. V:3691-92).

19. Ong International Files this Rescission Action.

On July 25, 1990 Ong International filed its action seeking rescission, as fraudulently induced, of all contracts between it and the Garner appellants, as well as restitutionary and punitive damages for the injury it suffered as a result of the Garner appellants' active concealment of the substandard crypt construction.

SUMMARY OF THE ARGUMENT

The trial of this case evidenced a massive fraud of the Garner appellants on Ong International.

The scheme of Garner's deceit in building wood crypts and portraying them as concrete crypts as shown in the inside model touched just about every fabric of the Salt Lake Mausoleum, from

the City building permit officials who issued permits for concrete crypts, to an insurance agent who insured the outdoor pavilion as all-concrete, to a sales manager who thought she was selling concrete crypts, to purchasers who thought they were buying outdoor concrete crypts at a mausoleum where Elder Hanks, the Osmonds, and other celebrities were to be interred, and ultimately to Ong International who invested as a partner with the Garner appellants in the Salt Lake Mausoleum partnership. Keith E. Garner displayed, abused and played-off to the Ong interests his religious connections, his stature in the LDS Church, his self-acclaimed integrity as a builder of millions of dollars in commercial and residential buildings in California and Utah. Alldredge, a respected banker of the Ong family, was sucked into the fraudulent scheme because of Garner's religious overtures and the Mausoleum's representation as a place of final and spiritual rest.

The Ong family, through Ong International, made its first investments in the United States in Utah because of the grand scheme and fraud of Garner. They invested $800,000 initially in the partnership and then an additional $420,000, for a total of $1,200,000 of capital in the Mausoleum partnership. The core of the Mausoleum partnership was the buildings. Understanding Garner's express representations as to the permanency of the represented concrete crypts in the outdoor pavilion just like the concrete model and indoor crypts, Ong International relied upon those representations knowing not that behind the marble facia of the outdoor pavilion were hundreds of stacked wooden crates made of plywood and chipboard and having no ventilation or drainage. When the treachery of the wood crypts was discovered, Ong International

was saddled with the cost of maintenance of the Mausoleum, the inability to sell crypts of any description in the outdoor pavilion because of the unmarketability of wood, the taint of the entire mausoleum, and a Mausoleum negative market value of <$819,000>. Out of better than 33,000,000 crypts in the United States, Ong International suddenly found itself in June 1990 with the only wood crypts in the country.

A centerpiece of the trial surrounded the credibility of the testimony as to whether Ong International was advised of the wood crypts by Garner prior to or at the time of the Partnership and Redemption Agreements. Garner's testimony was that he had expressly advised Alldredge and Ong about the wood crypts. That was backed by the testimony of Garner's personal secretary, Stewart, and his close friend and physician, Dr. Evans. Ong International's testimony was in stark contradiction that they had never been told by Garner or others or otherwise had never seen any wood crypts and would not have invested had it been known.

The jury squarely found under a clear and convincing test in favor of Ong International and against the Garner defendants. More than that, the jury found that the evidence was clear and convincing of a fraudulent swindle entitling Ong International to rescission and return of the purchase price of $1,240,000 and to consequential damages in the sum of $1,165,022. So extraordinary was the fraudulent misconduct of Garner, that the jury awarded $1,800,000 in exemplary damages.

The jury was properly instructed and charged as to the applicable law on fraud liability, rescission, consequential damages, punitive damages, fiduciary duty, and burden of proof. No

error with regard to the same is assigned by the Garner appellants herein. Garner assumed an astonishing position at trial--that wood crypts were warm, cozy and durable. That Ong International was entitled to concrete crypts as represented, not the cheap wood crates, was not lost on the court and jury. Neither was Garner's blatant perjury as to his assets, unmasked on the witness stand, missed by the trier of fact. The elements of fraud were plainly demonstrated in the evidence as were the consequential damages. The punitive damages are well within the Crookston test of this Court.

The second core defense of the Garner defendants at trial was that the general release executed by the parties as part of the Redemption Agreement and including language covering "known and unknown claims," was a full discharge of Garner from claims of fraud incident to both the Partnership and Redemption Agreements. The governing precedent of this Court firmly dictated the district court's ruling that fraud in the inducement of an agreement containing a general release was just as pervasive, diseased and insidious as any other agreement and that public policy would not permit a fraudulent schemer such as Garner to escape his false representations by inducing a party to sign a release.

The appeal of the Garner appellants herein must be denied. **They have failed fundamentally to marshall the evidence as required by the controlling decisions of this Court. They have failed outright to show any error in law as to release, rulings on evidence, instructions, or damages.** The Garner appellants' appeal was a miscarriage on arrival at this Court.

The judgment on the verdict of the jury of the district court should be affirmed in all respects.

ARGUMENT

I. THIS COURT MUST REJECT THE GARNER APPELLANTS' ATTACK ON THE FRAUD VERDICT, BECAUSE THEY UTTERLY FAILED TO MARSHAL THE EVIDENCE SUPPORTING THE VERDICT AND INSTEAD PRESENTED ONLY SELECTED EVIDENCE FAVORABLE TO THEIR POSITION.

The Garner appellants conspicuously failed to meet or even address the standard of review for challenging the district court's conclusions (R. 6:2533) based on the jury's unanimous findings (R. 5:1872-77) that the evidence sufficiently proved Ong International was the victim of fraud (warranting punitive damages) perpetrated by its partners, the Garner appellants, through their material omissions and misrepresentations regarding the wood crypts.

Findings underlying the judgment will not be disturbed "unless evidence on the issue 'so clearly preponderates in favor of the appellant that reasonable people would not differ on the outcome of the case.'" W. Fiberglass v. Kirton, McKonkie Etc., 789 P.2d 34, 35 (Utah Ct. App. 1990) (quoting Cambelt Int'l Corp. v. Dalton, 745 P.2d 1239, 1242 (Utah 1987)). This Court must, therefore, consider the evidence "in the light most favorable to the verdict" and may not overturn any verdict that is supported by "substantial and competent" evidence. W. Fiberglass, 789 P.2d at 35.

> To successfully attack the verdict, an appellant must marshal **all** the evidence **supporting** the verdict and then demonstrate that, even viewing the evidence in the light most favorable to that verdict, the evidence is insufficient to support it.

Id. (emphasis added). "The appellant's burden of proof to establish that the evidence does not support the jury's verdict and

the factual findings implicit in that verdict . . . is quite heavy." Id. (emphasis added).

Garner's Statement of Facts presents virtually none of the evidence as to appellants' fraud which both the jury and the district court considered so egregious. It is a study in posturing where Garner has a duty to be marshalling.

Under this Court's recent pronouncement in Crookston v. Fire Ins. Exchange, 817 P.2d 789, 800 (Utah 1991), failure to marshal evidence is by itself grounds to reject the Garner appellants' attack on Ong International's fraud verdict:

> Here, [the appellant] has made no attempt to marshal the evidence in support of the finding of fraud. In fact, all [the appellant] has done is argue selected evidence favorable to its position. That does not begin to meet the marshalling burden it must carry. We do not sit to retry the facts. This failure alone is grounds to reject [the appellant's] attack on the fraud finding.

(Emphasis added.) Garner's statement of the evidence deletes practically the entire first week of trial of Ong International's case in chief, as well as all adverse testimony Ong International elicited on cross and rebuttal examination--particularly the overpowering evidence on the Garner witnesses' lack of credibility.[4] The paltry testimony the Garner appellants marshalled in

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[4]The Garner appellants' witnesses, straight out of central casting, were so clearly biased and either hapless or untruthful that it may reasonably be inferred they left serious credibility gaps, if not chasms, between them and the jury.

Arnold Fluckiger, an architect, met Garner during the 1950s through the L.D.S. Church (Tr. III:156-57), has done projects for him since around 1967 (Tr. III:157) and regards him as a personal friend. (Tr. III:162). For his work on the never started second story addition to the indoor mausoleum, Fluckiger took 26 crypts valued at $3,000 each.

Robert Ord, the contractor for the outdoor pavilions and wood crypts, was one of the officers of a Garner corporation, and does the majority of his work exclusively for his best friend--Garner. (R. IV:3498-99, 3500) From 1975 on, Ord has officed with Garner without paying rent or utilities--including telephone charges. (R. IV:3503) Garner gave Ord two free crypts. (R. IV:3543)

their own favor came from Garner who, as the district court concluded (R. 6:2534), perjured himself in open court (Tr. V:3733-35).

The appellants' brief suffers the same malady as the wood crypt scam itself: It omits and misrepresents the substance of the evidence at trial.

The findings of fact "implicit" in the jury verdict, see W. Fiberglass, 789 P.2d at 35, compel the conclusion that the jury and the district court simply did not believe the appellants' witnesses. See, e.g., Canyon Country Store v. Bracey, 781 P.2d 414, 417 (Utah 1989) (where conflicting evidence was introduced at trial, appellate court assumes jury believed those facts that support its verdict).

Given the riveting elements of fraud in this case, the appellants have not met and cannot meet their **"heavy burden"** to challenge the jury's fraud verdict, including the punitive damage award. See W. Fiberglass, 789 P.2d at 35.

Susan Stewart, Garner's personal secretary, first met Garner in 1975 while she worked on Temple Square where he was president. (Tr. IX:4580) Her titular position is "director of the corporation" (Tr. IX:4583), and her corporate duties include turning on lights, raising the flag and the like (Tr: IX:4581).

Although Stewart had no active role in negotiating for the corporation, she traveled with Garner to Singapore and Hong Kong to meet with the Ong family. (Tr. IX:4631-32, 40) Stewart asked Alldredge not to tell Garner's wife Stewart would be with Garner on the trip. (Tr. IX:4695) Stewart saw Garner as a spiritual leader, and felt loyal to him. (Tr. IX:4632)

Burtis Evans, M.D. has known Garner since the mid-1960s and belongs to his Sunday study group. (Tr. IX:4650) In his deposition published at trial, Evans denied ever having had any business affiliation with Garner (Tr. IX:4660). He was impeached on the witness stand when shown a partnership agreement he had signed (Tr. IX:4661-72; Exh. 108) and an assignment of his 25% Roundhouse partnership interest to Garner (Tr. IX:4668; Exh. 108A).

II. CONTRARY TO LONGSTANDING UTAH CASE AUTHORITY, THE GARNER APPELLANTS CONTEND ON APPEAL THAT, BY HIDING BEHIND A GENERAL RELEASE, THEY SHOULD BE ABLE TO ESCAPE LIABILITY FOR THE FRAUD CONCEALED FROM THEIR PARTNER, ONG INTERNATIONAL.

The Garner appellants argue they may not be held liable for the fraud they concealed from their partner, Ong International, because Ong International released every fraud claim, "known and unknown", related to the wood crypts. Ong's execution of the Redemption Agreement, containing the general release, they submit wipes the slate clean.[5] The district court rejected that argument at every turn.[6]

In post-trial motions, the district court viewed the release as part of the fraudulent wood plot, stating that the release supported the finding that Garner had the requisite mental state to justify an award of punitive damages:

> The facts and circumstances surrounding the fraud show that over a period of three to four years, Garner misrepresented the nature of the plywood crypts to everyone necessary to advance his fraud, including customers, insurance agents, building inspectors, his own staff and his partners. He believed he could sell the mausoleum and escape the consequences of his fraud through the general release of claims.

(R. 6:2535)(emphasis added).

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[5]Paragraph 13.2 (Exh. 31, pp. 910) reads in relevant part:

> SLMM, its agents, officers, and employees from any and all claims, demands, rights of action or a causes of action, whether known or unknown, howsoever arising, which in any way are based upon or related to SLMM's association with the Partnership.

[6]The release issue was argued by Garner in the motions for (a) summary judgment (R. 2:669), (b) directed verdict and (c) for judgment n.o.v. (R. 6:2532-38; 7:2539-40).

The district court also refused the appellants' offered jury instructions nos. 5.1, 5.3 and 5.6 (R. 3:974-76), all of which set out the very argument raised by appellants here: The release must be enforced unless the fraud ran to the procurement of the release provision itself, not to the inducement to enter the agreement containing the release.

That Garner believed he could use the release to escape those consequences explains why he thought he could get away with this pervasive fraud in the first place. Garner was at the Mausoleum daily and controlled the business until the day he signed the Redemption Agreement containing the release (Tr. II:3036-37). Garner then disappeared (Tr. II:3043), dumping the crypt crates on his former partners.

The threshold question for this Court is whether the district court erred, as a matter of law, by denying the Garner appellants' motion for judgment n.o.v. concerning the purported release. "In passing on a motion for a j.n.o.v. . . . a trial court has no latitude and must be correct." Crookston v. Fire Ins. Exchange, 817 P.2d 789, 799 (Utah 1991); see also, e.g., Sprouse v. Jager, 806 P.2d 219, 221-22 (Utah Ct. App. 1991) (questions of law related to contract interpretation subject to correctness standard of review).

A. Utah Governing Authority Holds That A Release in A Fraudulently Induced Contract Is Unenforceable

In making the argument that the release clause with its known and unknown language operates, in law, to discharge Garner from fraud in the Redemption Agreement, Garner conveniently ignores established Utah authority that a fraudfeasor cannot escape liability for his fraudulent acts which are unknown to the other party.

Lamb v. Bangart, 525 P.2d 602, 609 (Utah 1974), is a vendor fraud case in which the defendants included in the livestock purchase agreement release clauses that would exonerate them should the subject breeder bull die or fail to produce a certain amount of

semen. After signing the agreement, the Lamb plaintiffs discovered the defendants had misrepresented both the bull's breeder status and potency.

Rejecting the argument that the plaintiffs released the fraud claims by signing the livestock agreement, the Court articulated the controlling public policy:

> [A] contract clause limiting liability will not be applied in a fraud action. The law does not permit a covenant of immunity which will protect a person against his own fraud on the ground of public policy. A contract limitation on damages or remedies is valid only in the absence of allegations or proof of fraud.

Id. at 608 (emphasis added).

Lamb is directly on point because it voids a release contained in a fraudulently induced contract.[7] "A release is a type of contract and may generally be enforced and rescinded on the same grounds as other contracts." Horgan v. Industrial Design Corp., 657 P.2d 751, 753 (Utah 1982).

Thus, there is no merit to the appellants' contention that "known or unknown" language of the general release in the Redemption Agreement renders "immaterial whether Plaintiffs consciously held in their minds all of the acts or omissions they were releasing when they signed the Redemption Agreement." (Appt. Br. 29) That statement compels the question in this case: **"Unknown to whom?"** **Certainly unknown only to Ong International, but not unknown to the appellants**. A fraud victim's lack of knowledge of

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[7]It is disingenuous of the appellants not to discuss Lamb, because Lamb was the basis of instruction No. 40 (R. 5:1840) (the case being expressly argued to the district court), and was the primary rationale for the district court's denial of appellants' motion for judgment n.o.v. concerning release (R. 6:2189-90; 6:2533; 7:2539-40). No appeal was taken by Garner from the court's instructions.

the claim as a result of active concealment by the other party to the release does not bring the facts within the meaning of the "unknown" release clause. As even the appellants' authorities hold, a general release exonerates only fraud claims known to both parties. See cases distinguished infra in notes 10-11.

Fraud is particularly lethal to a release when, as the jury found here (R. 5:1874), the perpetrator has a fiduciary relationship with the victim:

> Where a fiduciary relationship exists between the parties, the fiduciary owes a duty of full disclosure of the material facts when making a settlement and obtaining a release. The existence of the relationship creates a presumption of influence, which may be rebutted by proof that the parties dealt as strangers and that there was no unfairness in obtaining the settlement and release.

66 Am. Jur. 2d Releases § 21 (1973) (emphasis added).

The parties' release is void because the jury found that appellants were fiduciaries to Ong International and that they fraudulently induced the contracts between the parties.

B. The Testimony of Garner's Attorney, James Richards, Established that None of the Parties to the Redemption Agreement Discussed the Release of Fraud Claims Unknown to Ong International.

Ong International's position regarding the release is not only settled as a matter of law, but was clearly and convincingly evidenced at trial as a matter of fact. Since the release itself does not allude to undisclosed fraud claims, the parties' intent becomes critical. It is blackletter law that any material ambiguity in the interpretation of a contract clause, including a release provision, turns on the intent of the contracting parties. See, e.g., Colonial Leasing Co. of New England, Inc. v. Larsen Bros. Const., Co., 731 P.2d 483, 488 (Utah 1986); Kolar v. Ray, 492

N.E.2d 899, 902 (Ill. App. Ct. 1986) (intent of the parties to release governs scope of release). Intent also examines the reasonableness of the release:

> Relevant to the determination of this question are all of the facts and circumstances surrounding execution of the release. Also relevant to the determination is whether a reasonable person in the position of the releasor under the circumstances then existing would have had such intent.

Witt v. Watkins, 579 P.2d 1065, 1069 (Alaska 1978) (emphasis added).

The jury in this case was presented with ample evidence that no party to the Redemption Agreement discussed whether the release should extend to undisclosed fraud claims.

James Richards, an attorney who had represented Garner since 1987, prepared the Partnership Agreement and later the Redemption Agreement containing the release. (Tr. VIII:4465, 75, 80-81, 83)

When asked of the parties intent at trial, Richards testified that the issue of fraud was never discussed by the parties or their counsel[8]--not during the drafting or signing of the Redemption Agreement containing the release.[9]

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[8]For this reason, Alldredge's fax to Garner regarding release of "unspecified liabilities" (Appt. Br. 29) may by no means be construed as a release of fraud claims.

[9]MR. CAMPBELL: As a drafter of the document, were you generally aware of that law [referring to the policy statement in Lamb]?
MR. RICHARDS: That's a complex question and it's one on which I would do specific research if I had a question concerning that. The question did not arise.
Q: Didn't arise, you say. Wasn't discussed, you mean?
A: The issue of fraud was not brought up to get anybody released from fraud.
Q: Indeed. So what you're telling us is in the course of negotiations there was no discussion between you and Mr. Djang [counsel for Ong] as to the question of release for fraud; is that right?
A: That's correct.

C. The Garner Appellants, As Joint Venturers and Later Partners, Owed a Continuing Duty of Full Disclosure of the Wooden Crypts. Ong International Had No Independent Duty to Investigate.

The Garner appellants argue that they had no duty to disclose the wood crypts, because the misrepresentations at issue all occurred before the Partnership Agreement was entered. (Appt. Br. 32) They also argue that Alldredge had a duty to investigate the crypt construction. (Appt. Br. 37) (citing Burke v. Farrell, 656 P.2d 1015 (Utah 1982))

Both those arguments fail for three reasons: (1) As joint venturers the parties shared a fiduciary relationship requiring utmost honesty and disclosure; (2) the appellants' duty to disclose continued after the Partnership Agreement was signed; and (3) Alldredge, as a fiduciary, was entitled to rely on the appellants' omissions and misrepresentations and he had no duty of independent investigation.

The Garner appellants' reliance upon Burke is misplaced since those facts are wholly inapposite to the instant facts. In Burke, plaintiff's fraud claim against his partner was dismissed only because it was bottomed on the defendant's failure to disclose to the plaintiff the value of plaintiff's own partnership interest when the plaintiff was the managing partner. In the case at bar, Garner denied Ong International and Alldredge all access to the business records (Tr. II:3035, 42) and deleted all computer evidence of the records (Tr. II:3092). At the dates of the Partnership and Redemption Agreements, there was nothing to raise Ong International's suspicions about wood crypts.

(Tr. VIII:4487-88) (emphasis added); see generally (Tr. VIII:4485-90).

In point of law, Burke supports Ong International's position that

> [p]artners obviously occupy a fiduciary relationship and must deal with each other in the utmost good faith. . . . This duty applies when one partner . . . seeks to purchase the interest of another partner."

656 P.2d at 1017.

For Garner to argue that at the time of the Redemption Agreement, Ong International had no reason to rely upon its partner, Garner, because of the lack of trust that had developed, flies in the face of this Court's decision in Berkley Bank for Coops. v. Meibos, 607 P.2d 798, 805 (Utah 1980):

> It can hardly be maintained that the general moral level of business and other financial relationships would be enhanced by a rule of law which would allow a person to defend against a willful, deliberate fraud by stating, 'You should not have trusted or believed me' or 'Had you not been so gullible you would not have been [so] deceived.' The rules governing fraud should foster intercourse based on trust, forthrightness, and honesty.

D. Every "Release" Authority on which the Garner Appellants Rely is Immediately Distinguishable as Irrelevant to the Voidance of a Release Contained in a Fraudulently Induced Contract.

Appellants would have this Court rule that the release must be given legal effect even though Ong International's signing of the Redemption Agreement (of which the release was merely one clause) was induced by Garner's fraud that was so outrageous as to warrant punitive damages. Appellants would therefore have the Court conduct its fraudulent inducement analysis in a vacuum by excising the release from the entire agreement and deciding whether the release itself was fraudulently induced. (Appt. Br. 32-37)

That argument falls on its face, because, all provisions of a fraudulently induced contract are void, including any release provision contained therein. Cf. Horgan, 657 P.2d at 753.

Tellingly none of the appellants' cases cited in support of their release stance concern releases contained in fraudulently induced contracts running between the parties. The appellants' cases focus on fraudulent inducement of the release, because the release was the only contract in existence between the parties.

Appellants open with Winet v. Price, 4 Cal. App. 4th 1159, 6 Cal. Rptr. 1159 (1992), a totally inapposite case in which, fifteen years after signing a release, the plaintiff tried to sue his former attorney for malpractice claims, when the plaintiff knew at the time of release that he was entitled to be compensated for the attorney's inferior work. Id. at 559 & n.5. No fraudulently induced contract was at issue.

An even greater distinction is that Winet turned on the fact the release at issue expressly waived application of a California statute that states public policy supportive to Ong International: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release. . . ." Id. at 556 (quoting California Civil Code § 1542). No such waiver was present here.

Quealy v. Anderson, 714 P.2d 667 (Utah 1986), is not even about release per se, let alone fraudulently induced contracts. That case simply holds that a contract provision for attorneys' fees is waived unless included in the new agreement reached by accord and satisfaction.

Equally off-point is Lucio v. Curran, 139 N.E.2d 133 (N.Y. Ct. App. 1956), which involved a plaintiff's attempt to avoid a settlement release of known and pled claims that was deliberately negotiated during an action pending against a labor union. The court held the release was binding absent fraud or another viable defense. Id. at 135. Lucio stands for nothing more than the rule that settlor's remorse is insufficient to void a release. The Garner appellants cite a slew of other settlor's remorse cases, none of which have even remote relevance to fraudulent inducement.[10]

The Garner appellants' remaining cases are air balls--they miss the fraudulent inducement mark every time.[11] None of these

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[10]Paradisio v. Colonial Townshouses, 526 N.Y.S.2d 308, 312 (1988), is just another settlor's remorse case (from small claims court yet) holding that, in the absence of fraud, etc., the plaintiff released known claims in a pending lawsuit.

In Maxfield v. Denver & Rio Grande Western Railroad. Co., 330 P.2d 1018, 1019 (Utah 1958), a settlor's remorse plaintiff raised defenses of duress (losing job) and mutual mistake (plaintiff suffered no permanent injuries).

Horgan, 657 P.2d at 753, also involves settlor's remorse where the plaintiff claimed he signed the release under duress and coercion because he needed money and was emotionally stressed over losing his job.

No fraud of any sort was alleged in these cases, and the releases ran to known claims and were the sole contracts at issue.

[11]Kolar, 492 N.E.2d 899, is a personal injury case that has absolutely nothing to do with fraudulent inducement. That case simply held that release of the original tortfeasor released the physician whose treatment aggravated the injury.

Witt, 579 P.2d at 1069, merely holds that a personal injury plaintiff released claims for an undisclosed aspect of the injury, since that release was obtained without fraud or the like.

The court in Shelton v. Exxon Corp., 921 F.2d 595, 598-99 (5th Cir. 1991), held nothing more than that an assignee's release of an assigned claim bound the assignor.

National Union Fire Ins. Co. v. Circle, Inc., 915 F.2d 986 (5th Cir. 1990), discusses the release of a known claim that later proved more valuable than anticipated due to a premium increase that was unknown and **unknowable to both** the plaintiff and defendant at the time of release.

Regional Health Services, Inc. v. Hale County Hosp. Bd., 565 So.2d 109, 114 (Ala. 1990), expressly did not reach the fraudulent inducement question, because it was voluntarily withdrawn from appellate review.

cases involve release of fraud claims known to one party in a fiduciary relationship but not to the other.

In fact the very case on which the appellants' rely most heavily, Ingram Corp. v. J. Ray McDermott & Co., Inc., 698 F.2d 1295, 1314 (5th Cir. 1983), supports Ong International's position although, as in the majority of the appellants' other cited authorities, the case relates solely to settlement of a pending lawsuit. There was no fraudulently induced contract containing a release--the Ingram release was the sole contract at issue.

Ingram concerns the plaintiff's release of claims against the defendants before the plaintiff discovered the defendants had engaged in antitrust activity with nonparties. The narrow legal issue was whether a party can release antitrust claims of which it has no knowledge. The district court said "no" after several lengthy hearings to determine the nature and scope of the fraud. Id. at 1302-05. The appellate court reversed on the narrow fact-specific finding (and national antitrust policy) that antitrust claims can be released, because the fraud did not run to any contract the defendants had with the plaintiffs, id. at 1305.

The Ingram court determined the defendants' "silence as to possible antitrust is not the same thing as fraudulent inducement." Id. at 1315. The court then made the unequivocal statement:

> Fraudulent inducement sufficient to nullify a contract is obviously a different matter. It can vitiate a release. This is hornbook law.

The claims released in Pettinelli v. Danzig, 722 F.2d 706, 709-10 (11th Cir. 1984), were fully set out in the release, and there were no allegations that supported a prima facie case of fraudulent inducement.

Id. at 1314. The appellate court further noted that no fiduciary relationship existed between the Ingram parties, but that when a fiduciary relationship does exist (as the jury found here (R. 5:1874)), the parties are required to reveal all potential claims that will be released. Id. at 1315.

The instant release clause does not concern the release of known fraud claims pled in a pending action and does not involve settlor's remorse, or as the appellants' put it, Alldredge's "latent discontent" with the Mausoleum. (Appt. Br. 30) This case involves the appellants' actively and fraudulently concealing from their partners the fact that the res of the contract was worthless.

The Garner appellants simply cannot leave their partner stuck with the crates they stacked, by resting on a boilerplate release clause that in no way contemplates the release of undisclosed fraud claims--especially those of the present magnitude.

E. The Jury Found for Ong International on all Factual Questions Relevant to Release of Fraud Claims

The jury was properly instructed on the law governing release of undisclosed fraud claims arising in a fiduciary relationship.[12] The jury was also fully informed of the Garner appellants' position on the release issue. (Inst. 12; R. 5:1809)

Consequently, implicit in the fraud verdict are findings for Ong International regarding the following factual questions as to

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[12]Instruction no. 40 (R. 5:1840) stated:
A release is a type of contract and may generally be rescinded for fraud as with other contracts. For public policy reasons, the law does not permit a contract to contain a covenant of immunity that would protect a party against his own fraud. A release in a contract is invalid where the contract itself containing the release was fraudulently induced.

whether: (1) the Garner appellants had a fiduciary duty to disclose the wood crypts to Ong International before either the Partnership[13] or the Redemption Agreement was signed,[14] (2) Ong International reasonably relied on the appellants' material omissions and mispresentations regarding the crypt construction,[15] (3) the Garner appellants disclosed the wood crypts before the Redemption Agreement was signed,[16] and (4) Ong International knowingly and intentionally waived the right to sue on the claims.[17]

The jury expressly answered the first question, by special interrogatory III.1., finding there was a fiduciary relationship between the parties (R. 5:1926), and the remaining factual questions were implicit in the fraud verdict, Western Fiberglass, 789 P.2d at 35.

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[13]Instruction nos. 34 and 35 (R. 5:1834-35) state that the parties' fiduciary relationship was formed as soon as they became joint venturers.

[14]Instruction no. 21 (R. 5:1821) states that the "higher" duty of disclosure between fiduciaries creates the legal presumption that an omission or silence is a false misrepresentation. Instruction no. 41 (R. 5:1841) provides that, as fiduciaries, the Garner appellants had a duty to dislcose fully all potential claims known to them, and they bore the shifted burden to prove they did not fraudulently induce the agreements.

[15]Instruction no. 27 states that in a fiduciary relationship, a buyer does not have the duty to investigate at the time of the omissions and misrepresentations or afterwards. See also Instruction no. 26 (R. 5:1827) (no duty to discover latent building defects concealed by outer construction).

[16]Instruction 12 (R. 5:1809) lists all events that the Garner appellants claim show the wooden crypts were disclosed to Ong International before the Redemption Agreement was signed.

[17]Instruction no. 42 (R. 5:1842) on "waiver" states that intent to release the fraud claims may be found only should the jury determine Ong International knew about the fraud claims and intentionally relinquished the right to sue on them.

The pivotal question concerning release was, "Did Ong International know about the wood crypts before the Redemption Agreement was signed?" The appellants' witnesses Garner, Stewart and Evans answered, "Yes." (Tr. VIII:4324; IX:4594, 4638, 55, 80) Had the jury believed even one of them, this case would have been over. But the jury did not believe them, and neither did the district court on post-judgment motions. Those credibility questions will not be reviewed by this Court absent clear error by the finder of fact. See, e.g., State v. Strieby, 790 P.2d 98, 102 (Utah Ct. App. 1990) (jury's and district court's credibility findings deemed accurate unless evidence clearly shows they were erroneous).

It is therefore abundantly clear the appellants have failed their heavy burden to establish that the evidence does not support these factual findings implicit in the fraud verdict. See W. Fiberglass, 789 P.2d at 35.

F. The Appellants' Contention that the Fraudulent Misrepresentations Were Material is Erroneous.

The Garner appellants argue they had no duty to disclose the wood construction because the fact was immaterial to Ong International's decision to enter either the Partnership or Redemption Agreement containing the release. (Appt. Br. 38-40)

The uncontroverted evidence at trial established that the Mausoleum for which Ong International paid over $1,200,000.00 had a negative value of over $800,000.00. (Exh. 85) It could not be even auctioned off for a trivial sum, because of the huge potential liability to crypt purchasers, particularly the families of those already interred. (Tr. VI:3971-72, 74-76)

In the face of that uncompromising evidence of grand fraud, appellants announce to this Court that "[p]laintiffs' evidence utterly fails to establish the legal or factual materiality of any misrepresentation of wooden crypts." (Appt. Br. 38)

On the element of materiality, the jury was instructed as follows:

> As to the claim of fraud, the first element that must be proven is that the defendants' representations were material. Representations or omissions are material if they were an important part of the transaction to the extent that the transaction would have been different or would not have occurred at all without such representation or omission. The representations must relate to presently existing facts or matters. . . .

(Inst. 18; R. 5:1818) (emphasis added).

Hence the materiality of the wood crypts is that Ong International would not have purchased the Mausoleum but for the appellants' fraudulent omissions and misrepresentations regarding the construction of concrete crypts. (Tr. V:3829-30) Those fraudulent omissions and misrepresentations about the wood crypts are the storm center of the Partnership and Redemption Agreements.[18]

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[18]The Garner appellants' "experts" knew nothing whatsoever about mausolea or crypts, let alone the use of wood in them.

Robert Wilcoxen is a funeral director and embalmer. (Tr. VIII:4397) His only experience with "wood" related to mahogany and glass "niches" or boxes designed to house the urns holding cremated remains from which, no fluids or gasses could be expected to emit. (Tr. VIII:4401, 03) Wilcoxen had never sold or tried to sell a wooden crypt (Tr. VIII:4420) or been involved with a mausoleum that sold them (R. VIII:4413). He had never even seen anything other than concrete crypts until he was hired as the appellants' expert. (Tr. VIII:4421-22)

Herbert Schroeder is a professor of wood chemistry (Tr. VII:4238) who was prepared to render details about the life and times of trees, but had never seen a wooden crypt until SLMM hired him, had only been in a mausoleum once before, and had never been consulted about use of wood in a mausoleum or crypt. (Tr. VII:4253)

Lawrence Reavely is a structural engineer (Tr. VII:4262) who deals with concrete, but was totally unfamiliar with the concrete used at SLMM. (Tr. VII:

In fact the district court considered that Garner's assertion that wooden crypts are really okay a significant "mental state" factor in refusing on post-judgment motions to set aside or remit the punitive damages award against the Garner appellants:

> Garner has shown no contrition for his acts; on the contrary, he persists in arguing that he cannot understand the dispute because wooden crypts ought to be good enough for anyone.

(R. 6:2535)

The Garner appellants' summary treatment of Ong International's expert testimony that the Mausoleum is unsalable[19] and has a negative net worth merely underscores their inability to come to terms with the depth of their fraud.

It is not credible that Garner would actually assert that Cramer Stiff's expert testimony for Ong should be disregarded, because he "admitted" he has never sold a wooden crypt. (Appt. Br. 38) Before this case, Stiff had never seen or heard of a wooden crypt (Tr. VI:3973), and neither had James Milne after being involved with over 500 mausolea located throughout North America[20]

4268A) Reavely talked about the durability of the wood (Tr. VIII:4289); however, he admitted having seen "bowing and warping" in the vertical walls (Tr. VIII:4291). Reavely had never designed a crypt or a mausoleum (Tr. VIII:4293) and knew nothing about mausoleum industry standards (Tr. VIII:4294).

[19]The Garner appellants seriously misstate the record by their repeated assertion that Kovalenko was told about the plywood construction of the crypts before he purchased them. (Appt. Br. 39, 71) In fact Kovalenko was impeached on the stand by use of his deposition taken the previous month. (Tr. VIII:4390) After being confronted with his deposition, Kovalenko was forced to retract his earlier testimony (Tr: VIII:43 87-88, 89, 93) and admit he had been pitched the Osmonds (Tr. VIII:4391-92), and had not been told about the plywood construction (Tr. VIII:4394).

[20]The appellant's portrayal of Milne's damning testimony as relating soley to the aesthetic desirability of marble recesses and the question "whether the ventilation system might have been better," (Appt. Br. 38) is unworthy of argument.

(Tr. IV:3567). That is of course, what this case is about. Plywood crypts do not exist outside Garner's conduct at the Salt Lake Memorial Mausoleum.

III. THE DISTRICT COURT PROPERLY ADMITTED EVIDENCE OF GARNER'S WEALTH.

Appellants contend that the district court erred by denying their motion for a new trial asserted on the ground that the court improperly admitted evidence of Garner's wealth.[21]

Under Rule 59, "it is well settled that, as a general matter, the trial court has broad discretion to grant or deny a motion for new trial." Crookston, 817 P.2d at 804 (emphasis added). The district court was legally correct in denying the Garner appellants' wealth-related motion in limine and their Rule 59(a) motion. (R. 6:2533; 7:2540).

By Stipulation before Trial, the Garner Appellants Agreed that Utah Code Ann. § 78-18-1(2) (1992) does not Apply Retroactively to this Case.

The rest of their summation of Milne's testimony is simply a fabricated indirect quote that "crypts should have a drainage system," although "one is needed for only one in every several hundred crypts." (Appt. Br. 38) That statement appears nowhere in the transcript of Milne's testimony (let alone at the referenced page (Tr. IV:3618)).

[21]Appellants raise a new "wealth" argument on appeal that was not argued to the trial judge: whether it is ever proper for a jury to consider the defendant's wealth in arriving at a punitive damages figure. (Appt. Br. 41-44) They also point out (without claiming error in the instruction) that Instruction No. 51 (R. 5:1852) states that the jury "must consider the relative wealth of the Garner defendants" when making the punitive damages award. (Appt. Br. 43)

Both arguments are bankrupt in light of this Court's recent pronouncement in Crookston:

> The stated list of factors we have said must be considered in assessing the amount of punitive damages to be awarded include the following seven: (i) the relative wealth of the defendant . . . .

817 P.2d at 808 (emphasis added) (citing Von Hake v. Thomas, 705 P.2d 766, 771 (Utah 1985)).

It is important to note at the outset that Judge Frederick held the admission of Garner's tax returns under advisement until he determined that Ong International had made out a prima facie case of liability and that punitive damages would be submitted to the jury. (Tr. VII:4235)

Furthermore the appellants themselves put Garner's wealth at issue, because his "experience resumes," name-dropping, statements about having "a lot of money," showing off his conspicuously consuming lifestyle, all a calculated part of the inducement for Ong International to become his partner. (Tr. I:2931-33, 58, 3025-28; V:3654; IX:4584) From testimony of Garner's statements and activities alone, the jury was presented ample evidence of his pride and his wealth. (Tr. I:2941-42, 2952-53; II:2973, 80, 3036)

Garner's contention that § 78-18-1(2) mandated bifurcation of the liability and punitive damages portions is clearly flawed. Before bringing their motion in limine regarding Garner's wealth, the appellants specifically agreed that the statute would not apply retroactively to this case. The appellants' primary concern at that juncture was that the jury would inflate the verdict should it be instructed on subpart (3) of § 78-18-1, which requires that the State be paid a portion of punitive damages awards that exceed $20,000.[22]

After first agreeing the statute did not apply, the Garner appellants' did a complete volte-face and argued it applied only

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[22]Section 78-18-1(3) reads:

> In any judgment where punitive damages are awarded and paid, 50% of the amount of the punitive damages in excess of $20,000 shall, after payment of attorneys' fees and costs, be remitted to the state treasurer for deposit into the General Fund.

for bifurcation purposes. The district court soundly rejected that notion by Minute Entry:

> Defendants' second Motion in Limine is denied for the reasons set forth in plaintiffs' memorandum in opposition. Title 78-18-1 et seq. U.C.A., effective May 1, 1989 is not applicable, the events involved in the instant proceeding having occurred prior to said effective date, and the statutory scheme having prospective application only.

(R. 4:1398); Utah Laws, ch. 237 § 4 (1989).

The express language regarding the effective date is restated in the notes to the statute and underscored in Crookston, 817 P.2d at 807: "[Section 78-18-1] does not apply to this case because it is made applicable only to claims for punitive damages arising on or after May 1, 1989."[23]

The correctness of that ruling is also amply supported by the uncontroverted evidence that the appellants' fraudulent inducement of the Partnership and Redemption Agreements at issue occurred before Garner vacated the Mausoleum in March 1989.[24]

Needless to say, the jury was not instructed on § 78-18-1 for any purpose, and the Garner appellants cannot raise the issue now.

Moreover the appellants have not cited one Utah case in support of their contention that bifurcation was "mandated," but rely instead on foreign cases. Unfortunately for Garner, the wood crates were patched together in Salt Lake City, and no Utah court

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[23]There is nothing to the Garner appellants' argument the statute should be applied retroactively because it is procedural rather than substantive. (Appt. Br. 47) That question need not be reached, since the legislative history contains express language that the statute is to be applied only prospectively.

[24]The Garner appellants' spurious "discovery" argument (Appt. Br. 47) is new on appeal; it was never raised below in their motion in limine, objections at trial or motion for a new trial. At trial the appellants merely argued the substantive/procedural question. (R. 2:6851-52)

has ever held it is manifest error to try liability and punitive damages together. Indeed simultaneous submission to the jury of all damages evidence has long been the practice in Utah courts and bifurcation has been the exception.

In all events the appellants waived any argument regarding § 78-18-1. That waiver ran to all sections of the statute, not just those that did not meet the appellants' needs.

IV. THE FINAL JUDGMENT ENTERED, INCLUDING RESTITUTION, COMPENSATORY DAMAGES AND PUNITIVE DAMAGES, REFLECTED THE PROPER MEASURE OF DAMAGES FOR RESCISSION BASED ON FRAUD AND WAS FULLY SUPPORTED BY COMPETENT EVIDENCE--THE PUNITIVE DAMAGES ARE WELL WITHIN THE CROOKSTON RATIOS.

The Garner appellants' broadside attack on the verdict is nothing more than a fusillade of omissions and misrepresentations related to the evidence at trial and the entry of final judgment.

A. The Final Judgment Entered Contained No Damages for Conversion, Breach of Fiduciary Duty or Benefit of the Bargain.

The Garner appellants' arguments related to damages for conversion, breach of fiduciary duty and benefit of the bargain[25] should be totally disregarded, because, contrary to the appellants' blatant misstatement (Appt. Br. 67), judgment was entered only on the entire restitutionary award, including $1,240.220 (Ong International's capital investment of $800,000 plus its redemption

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[25]The Garner appellants assert that the benefit of the bargain evidence was immaterial. To the contrary, the jury was instructed that the difference in the mausoleum's property value "as was" and "as represented" was relevant to whether the Garner appellants' misrepresentations were "material and substantial." (Inst. 45; R. 5:1845) For the same reason, the trial court did not err by allowing Ong International's damages expert, William R. Lang, to testify that the Mausoleum had a negative net worth. (Tr. VI:4063) There can be no serious question about that testimony's materiality to the fraudulent inducement claims.

Furthermore the appellants waived any objection to Mr. Lang's testimony by failing to object below. Id.

payment of $440,220), the consequential damages award of $1,165,022, and the punitive damage award of $1,800,000.

The final judgment is fully supported by relevant authority concerning the measure of damages in a case of rescission based on fraud. Most importantly the final judgment is also supported by competent evidence at trial.

B. By Failing to Make Timely Objection Below the Garner Appellants Have Waived all Right to Appeal the Consequential Damage Award.

Ong International's election to rescind for fraud all agreements between the parties entitled it to compensatory damages for (1) full restitution of the amount invested and (2) consequential damages necessary to restore its status quo ante.

The Garner appellants here contest both Ong International's entitlement to and the amount awarded as consequential damages. The appellants, however, have waived the right to appeal the compensatory damages award by not objecting to:

(1) introduction of the consequential damages evidence at trial (Tr. VII:4139-40);

(2) the consequential damages section of the special verdict form, before the form was submitted to the jury; cf. Bennion v. LeGrand Johnson Co., 701 P.2d 1078, 1083 (Utah 1985), or

(3) the answers to the relevant special interrogatories after the verdict was rendered, but before the jury was discharged (Tr. XI:4831-45), see, e.g., Ute-Cal Land Development Corp. v. Sather, 605 P.2d 1240, 1241 (Utah 1980) (defendants waived right to challenge verdict by not objecting before jury dismissed).

Furthermore the appellants did not raise the consequential damages issue in their motion for new trial or remittitur (R.

5:1920-22), and did not appeal the related jury instructions (R. 5:1847-50). The consequential damages argument is just another issue barred on appeal, because it was never presented to the district court.

In all events consequential damages are properly included in the measure of damages for rescission based on fraud.

C. Ong International's Election of Rescission Against the Garner Appellants Entitles It to Full Restitution Including Consequential Damages.

"Rescission is a restitutionary remedy which attempts to restore the parties to the status quo to the extent possible or as demanded by the equities in the case." Breuer-Harrison, Inc. v. Combe, 799 P.2d 716, 731 (Utah Ct. App. 1990) (citing Dugan v. Jones, 724 P.2d 955, 957 (Utah 1986)) see also Mawhinney v. Jensen, 232 P.2d 769, 773 (Utah 1951). Because the goal of rescission is to restore the parties to their pre-agreement status, the court may need to award certain consequential money damages to make full restitution. See D. Dobbs, Remedies §4.8, at 293 n.12 (1973).

As required or mandated by Utah law, Ong International tendered the mausoleum back to the Garner appellants to put them in status quo ante; thus the damages inquiry at trial was limited to determining the amount the Garner appellants would be required to pay to return Ong International to its pre-Partnership Agreement status, that is, to make it whole.[26]

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[26]The Garner appellants acknowledge that the purpose of rescission is to restore the parties to status quo, but mischaracterize Dugan v. Jones, 724 P.2d 955 (Utah 1986), as standing for the proposition that consequential damages are not available in rescission cases.

Consequential damages to a rescinding party were not at issue or discussed in Dugan; however, that court did state that the trial court has the discretion to do whatever is necessary to return the parties to status quo. Id. at 957

"[M]ost legitimate claims for damages" will be allowed in rescission and retribution cases.[27] D. Dobbs, supra § 9.4, at 633. Any proximately caused expense that does not duplicate the general recovery is recognized. Id. § 9.2, at 601; see generally Restatement (Second) of Torts § 549 (1977).

As stated in the related jury instruction, it was not necessary that Ong International's claims for consequential damages be proven with "absolute precision or exactness"; they needed only to "represent a reasonable estimate of the loss or injury suffered." (Inst. 50; R. 5:1850) At trial Ong International offered evidence of three categories of consequential damages in the following amounts: (1) $603,472.00 in cash advances to operate the mausoleum[28] (Tr. VII:4152); (2) $473,690.00 for interest Ong International paid on the advances (Tr. VII:4154); and (3)

(returning parties to status quo is equitable and requires "practicality" in adjusting parties' rights).

[27]Available consequential damages include but are not limited to:
(1) loss of profits, D. Dobbs, supra § 9.2, at 598;
(2) expenses resulting from fraud, id.;
(3) "loss of good will suffered with customers" and damage to reputation, id.;
(4) any expenditure in mitigation of damages, id. at 599;
(5) lost earnings; id.;
(6) prejudgment interest, id.; and
(7) loss of interest on loans required to finance the business, id.

[28]The Garner appellants again misstate the record by citing to Alldredge's salary as an operating expense, but failing to point out that Ong International's damages expert, Grant R. Caldwell, C.P.A., discounted the salary to $75,000.00, which Cramer Stiff testified was a reasonable salary for a manager of a mausoleum. (Tr. VII:4152)

$87,860.00 for a reasonable rate of return on Ong International's capital investment of nearly $1,300,000 (Tr. VII:4161).[29]

The Garner appellants offered no evidence at trial to controvert those numbers, and on appeal they do nothing more than feign shock and ignorance that consequential damages should even be available in a rescission case. (Appt. Br. 59-60) There is established Utah authority for awarding consequential damages in rescission cases. See, e.g., Synergetics By and Through Lancer Indus., Inc. v. Marathon Ranching Co., Ltd., 701 P.2d 1106, 1109 (Utah 1985) (in rescission case, court awarded restitution plus consequential and punitive damages).

Any attack on the restitution and consequential damages award falls under its own weight for lack of support and untimeliness of objection. Equally insupportable is the Garner's attack on the punitive damage award.

D. Punitive Damages are Appropriate in Rescission Cases Where the Predicate Act is Fraud.

It is well established in Utah that punitive damages may be awarded in rescission cases based on fraud. See, e.g., Nash v. Craigco, Inc., 585 P.2d 775, 776 (Utah 1978); Clayton v. Crossroads Equipment Co., 655 P.2d 1125 (1982) (repossession of property plus punitives).

Synergetics, 701 P.2d at 1109, a case fact-similar to this one, affirmed the trial court's award of rescission of the two

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[29]Caldwell testified that 10% was a reasonable rate of return expected for a typical investor during the relevant period. (Tr. VII:4148) It should be noted that Ong International chose the reasonable rate of return measure of damages in lieu of prejudgment interest. The amount awarded is hardly speculative considering that, for nearly three years, Ong International was deprived the use of the bulk of its capital funds. (Tr. VII:4149)

contracts at issue plus $100,000 for the rental of a boat necessitated by the subject fraud, $200,000 in punitive damages, plus costs. The Synergetics predicate acts for the remedy of rescission were, as here, the defendants' fraud, misrepresentations and deceit. Id. at 1108.

Hence it was proper for the jury to find that rescission, restitutionary damages (purchase price plus consequential), and punitive damages should be awarded Ong International.

E. The District Court Correctly Concluded that, as Required under Crookston, the Punitive Damages Award Bore a Reasonable Relationship to the Compensatory Damages Award.

The Garner appellants' argument that the punitive damages award is not reasonably related to the consequential damages is as flimsy as the wood crypts. It rests entirely on mischaracterization of the unanimous fraud verdict, and of the legal and factual support for the verdict.

Crookston, 817 P.2d at 805, sets out the standard of appellate review for a district court decision to deny a motion for new trial "challenging the verdict as excessive under rule 59."

> In reviewing the judge's ultimate decision to grant or deny a new trial, we will reverse only if there is no reasonable basis for the decision. . . . [A] trial court's decision to deny a new trial will be upheld if there is a reasonable basis to support that decision.

Id. at 805 (emphasis added) (footnote and citations omitted).

"Any motion for new trial on the question of punitive damages requires that the trial court engage in a two-part inquiry:

> (i) whether punitives are appropriate at all, i.e., whether the evidence is sufficient to support a lawful jury finding of defendant's requisite mental state, and

> (ii) whether the amount of punitives is excessive or inadequate, appearing to have been given under the influence of passion or prejudice."

Id. at 807 (footnotes and citations omitted).

The first prong is satisfied where there is "'"wilful and malicious"' conduct, . . . or . . . conduct which manifests a knowing and reckless indifference toward, and disregard of, the rights of others.'" Id. (quoting Behrens v. Raleigh Hills Hosp., Inc., 675 P.2d 1179, 1186 (Utah 1983) (citations omitted)).

The second prong is the subject of Crookston's thorough discussion of the guidelines for punitive damages awards. 817 P.2d at 807-13. The Crookston Court stated that it fixed "the primary responsibility of reviewing the amount of punitive damage awards on the court best equipped to perform such review--the trial court." Id. at 813.

> We make it plain that the appellate court's role is to review the trial court's new trial ruling rather than the jury's verdict directly.

Id.

> If the ratio of punitive damages to actual damages falls within the range that [the Utah Supreme Court] has consistently upheld, then the trial court may assume that the award is not excessive. In denying a rule 59(a) motion for new trial, the trial court need not give any detailed explanation for its decision if the punitive damage award falls within the ratio.

Id. at 811 (emphasis added). "A trial court's decision to deny a new trial will be upheld if there is a reasonable basis to support that decision." Id. at 805. The propriety of a punitive damages award should be determined on a "case-by-case basis." Id. at 813.

1. The Garner appellants do not even attempt a serious assault on the district court's seven-factor findings that the appellants had the requisite mental state to justify the punitive damages award.

Under each of the seven factors in punitive damages award, see, e.g., Crookston, 817 P.2d at 808, the district court set out evidence that showed Garner acted with "knowing disregard of the rights" of his partners.[30]

In an astounding display of denial and obfuscation, the Garner appellants assert there was no evidence of Garner's malice, because he "has had a long-standing preference for the natural warmth of wood as a construction material." (Appt. Br. 53; Tr. IX:4592) Indeed "he was proud of wood and extolled its benefits . . . ." (Tr. IX:4652, 4555)

That testimony and the "innovator" piece came from Garner's life-long physician and study group companion (Tr. IX:4655, 80), whose credibility was seriously damaged by his irreconcilably inconsistent testimony regarding previous business relations with

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[30]The following is a capsule of the court's findings (R. 6:2534-37):

(1) Relative wealth of the defendant: Garner is a multi-millionaire who perjured himself regarding his net worth.

(2) Nature of the misconduct: The appellants' fraudulent representations about the wood crypts caused Ong International to pay $1,240,220 for worthless property.

(3) Facts and circumstances surrounding the misconduct: For three to four years Garner misrepresented the nature of the crypts to everyone necessary to his scheme, then believed he could escape all consequences through the general release of claims. Garner has shown no contrition for his acts, but rather, contends wooden crypts are good enough for anyone.

(4) Effect on the lives of plaintiffs and others: Ong International suffered tremendous "uncompensated" loss of time, money and resources devoted to the case. Moreover the appellants committed "egregious" fraud on the public by defrauding crypt purchasers and trafficking in people's trust in their religious leaders.

(5) Possibility of future recurrence: Although it is unclear what Garner will do with the plywood crypts, perhaps the punitive damages will deter him from influence peddling and using L.D.S. Church stories and personalities to pitch his sales.

(6) Relationship of the parties: The Garner appellants committed fraud against partners with whom he shared a fiduciary relationship requiring the "highest level of openness, trust and confidence."

(7) Amount of actual damages: The ratio of punitive damages to actual damages is 1:1-1/2, which is well within the Crookston standards for reasonability of relationship.

Garner.[31] (Tr. IX:4655-73) Appellants simply cannot meet their heavy burden to overcome the implicit finding in the jury's unanimous fraud verdict that it simply did not believe the study companion's story about Garner's purported disclosure of the wood crypts.

Moreover, if one were to accept somehow Garner's "pride-and-joy" claim, the unsolved mystery is why he would continually pass off the crypts as concrete to all interested persons[32]: partners, government officials, insurance agents, his own sales personnel and unwary crypt customers.

Garner's mens rea should be as clear to this Court as it was to the district court and jury.

The sole question remaining is whether the relationship of punitive damages to compensatory damages is reasonable under Crookston, 817 P.2d at 810-11.

2. The punitive damages award does not exceed the Crookston guidelines, because the fraud damages are nearly 1-1/2 times the punitive damages

The appellants argue that a new trial is warranted under Utah R. Civ. P. 59(a)(5), because the $1.8 million award for punitive

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[31]The witness' loss of credibility is important, because the jurors were given the stock instruction that if they believed any witness wilfully testified falsely, they could "disregard all the evidence from that witness" unless it was "corroborated by other credible evidence." (Inst. 58; R. 5:1859) (emphasis added).

[32]The Garner appellants make the weightless argument that lack of intent is shown by the fact the crypts were open to view during their construction. Certainly plywood could be expected while the crypts were under construction, and would not raise questions in the minds of persons not knowledgeable about mausoleum construction. Indeed Garner's assurance to the insurance agent, Steve Nielson, that the wood was framing for poured in place concrete (later to be removed) is precisely the reasonable inference any unsophisticated observer could draw from seeing plywood and two-by-fours in the crypts under construction.

damages was excessive and therefore must have been made under the influence of passion or prejudice.[33]

The complete misperception underlying their argument is that the sole fraud damages awarded in this action were those for $447,034 against Garner individually under Interrogatory IV.A.1 of the Special Verdict. The appellants therefore claim the punitive damages exceed the fraud damages by a 4-to-1 ratio.[34]

By making that bogus argument, the Garner appellants ignore two facts: one, that compensible damages actually awarded based on fraud were $1,165,022; and, two, that Ong International voluntarily did not include in the Judgment and Decree of Rescission on Special Verdict of the Jury (R. 5:1923-36) the $447,034 the appellants assert were the sole fraud damages awarded. See full discussion at Point IV in section A. That amount was deleted as duplicative of the remaining fraud damages.

An equally core misapprehension is the Garner appellants' view that the restitutionary damages in this case, comprised of the purchase price and consequential damages flowing from the fraud, are somehow not really "fraud damages" and cannot therefore be the basis for calculating punitive damages. (Appt. Br. 53)

What the appellants appear to be missing is the memory that

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[33]Crookston creates no presumption based on the dollar figure of the punitive damage award, but rather, examines the reasonability of the relationship of punitive to actual damages. 817 P.2d at 811.

[34]The appellants' argument abandons logic, since they simultaneously assert (1) the so-called "fraud damages" against Garner, individually, were improper (Appt. Br. 60-61); and (2) those same damages are the sole basis for determining the reasonableness of the punitive damages award (Appt. Br. 52).

The reductio ad absurdum of that inconsistency is that Ong International was awarded no fraud damages at all--particularly since the $447,034.00 against Garner, individually, was not part of the final judgment.

the predicate act for this rescission case is fraud--not some other theory. Consequently all damages required to restore Ong International to status quo ante are the very "compensatory fraud damages" to which punitive damages must be compared under Crookston. And that is precisely what the district court correctly held in its denial of a new trial or remittitur:

> [T]he amount of punitives award, $1,800,000.00, when compared to the actual damages resultant from defendant Garner's conduct, $1,165,022.00 consequential, and $1,240,220.00 for rescission (which is an award necessitated by Garner's fraud), for a total of $2,405,242, the ratio range is approximately 1:1-1/2.

(R. 6:2533-34) (emphasis added). The court concluded that ratio showed a "reasonable and rational relationship of punitives to actual damages," which fell within the Crookston "rationale." (R. 6:2534).

The district court also emphasized that punitive damages are appropriate for punishment as well deterrence. (R. 6:2536) (citing Synergetics, 701 P.2d at 1112).

Importantly Ong International's restitutionary fraud damages are "hard compensatory damages" of money lost rather than soft damages of pain and suffering or the like, the distinction between which is discussed in Crookston, 817 P.2d at 811-12. Moreover, Crookston holds that hard compensatory damages are properly considered under Utah R. Civ. P. 59(a)(6) to determine the sufficiency of the evidence to justify the punitives verdict. Id.

Here Ong International lost the use of its capital investment and was required to pour operating capital money into an unmarketable mausoleum. There can be no question that these hard compensatory fraud damages form the basis of comparison for punitive

damages purposes. Similarly there can be no question that the hard compensatory damages of approximately $2.4 million bear a reasonable relationship to the $1.8 million punitive damages award. The amount is certainly not excessive and there is no indication the jury was influenced by passion or prejudice.[35] See Utah R. Civ. P. 59(a)(5).

V. NOTHING IN THE POTPOURRI ASSEMBLAGE OF APPELLANTS' MISCELLANEOUS CLAIMS ASSERTS ANYTHING CLOSE TO REVERSIBLE ERROR OR MANIFEST INJUSTICE

The "passion and prejudice" section of appellants brief (pp. 56-71) is a hodgepodge of misleading and meaningless arguments--many of which have been waived on appeal for failure to object below.

None of the errors claimed here constitute plain error or manifest injustice sufficient to warrant the retrial of this complex case.

A. Ong International Elected Only One Remedy: Rescission based on Fraud

For several reasons it is complete error of the Garner appellants to assert that "the trial court never required [Ong International] to elect rescission or damages as their remedy." (Appt. Br. 60)

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[35]This Court should not be moved by Garner's complaint that the verdict nearly bankrupted him. (Appt. Br. 54-55) In fact it is surprising Garner would bring up bankruptcy.

On October 17, 1991, at 8:00 a.m. the morning after filing for a second stay of execution of judgment (the first was denied), Garner filed a voluntary petition for Chapter 11 bankruptcy. (R. 6:2382-84) On Monday, October 21, 1991, Ong International filed a motion to dismiss, or in the alternative to strike, Garner's petition as a bad faith filing. (R. 6:2406-42) Garner's bankruptcy schedules (R. 6:2526) showed the petition was nothing more than a delay and diversion to avoid the consequences of his fraud judgment.

After a full evidentiary hearing, the Bankruptcy Court granted Ong International's motion and dismissed Garner's bankruptcy petition for cause. (R. 6:2476-78)

By its Notice of Election of Remedy of August 4, 1991 (R. 3:1208-10), Ong International unequivocally elected the remedy of rescission against SLMM/11th Avenue Corporation and looked to Garner individually (as the fraudulent inducer) only for the amount of restitutionary damages the corporation could not pay. See Ong International's Trial Brief (R. 4:1336-40); see, e.g., Meredith v. Ramsdell, 384 P.2d 941, 944-46 (Colo. 1963).

"The doctrine of election of remedies applies only between the parties to a transaction so that one party may seek cancellation and then sue a third party for procuring the transaction through fraud." Strout Realty, Inc. v. Burghoff, 718 S.W.2d 469, 471 (Ark. Ct. App. 1986).[36]

In addition, the court instructed the jury that "Ong International claims it is entitled to be paid only once for the relief it seeks. . . ." (Inst. 15; R. 5:1813) The instruction continues:

> Accordingly, you shall answer the Interrogatories on the Jury Verdict submitted and if you determine that damages are due on more than one theory or claim to an individual defendant, the Court, in formulating the judgment on your verdict, will ensure that Ong International will be entitled to recover its damages, but in total no more than the damages sustained, regardless of how many entities may be required to respond.

(Emphasis added.)

On the basis of that stipulation and instruction that a judgment against the corporation would be a judgment against Garner individually, Ong International withdrew all its alter ego instructions. (R. 3:1133-34; 5:1806-07)

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[36]In the Garner appellants' objection to Ong International's election of remedies (R. 3:1288-99), they acknowledge and even argue for the rule in Strout Realty, 718 S.W.2d at 471, that the fraudulent inducer is individually liable for the portion of restitution the corporation cannot pay (R. 3:1297).

True to instruction No. 15, the fraud award against Garner individually was not included in the final judgment, since the full restitutionary and punitive damages award against SLMM/11th Avenue was entered against Garner as well.

The Garner appellants' mischaracterization of the election question is therefore disingenuous.

B. This Court May Ignore Altogether the Appellants' A-to-S Claims Regarding the District Court's Comments and Evidentiary Rulings

The appellants devote ten pages of their brief to sundry complaints they letter "A" through "S" (Appt. Br. 61-71), many of which concern the district court's unexcepted comments or the court's post-trial review of the evidence. The remaining contentions relate to evidentiary rulings that are legally correct and by no stretch amount to reversible error.

It is important to note at the outset that Jury Instruction No. 3 (R. 5:1795) properly instructs the jury not to draw any inferences from the trial judge's acts, statements or evidentiary rulings. The instruction states that the jury is the sole judge of all the fact questions and that the judge has "not intended to express, or to intimate, to be understood as giving any opinion on what the evidence proves or does not prove, or what is or is not fact in this case." Id.

In light of the instruction and for reasons set out below, nothing in the "A-S" section warrants retrial of this case.

1. Review of the district court's "comments" is waived for the appellants' failure to timely object.

As tempting as it is to showcase the appellants' lack of intellectual candor by examining each "comment" complaint in full

context,[37] it would be a waste of time to do so, because all such claims of error are barred from appellate review, since the appellants failed to object to the comments when they were made at trial.

The "contemporaneous objection rule" is simple: "An objectionable remark directed to the jury must be excepted to or it may not be reviewed on appeal." State v. Kotz, 758 P.2d 463, 466 (Utah Ct. App. 1988).

The Garner appellants cannot escape waiver under that rule by simultaneously conceding and contending that the district court's comments were insignificant, but "as a whole," they "wove a tight curtain between Defendants and the jurors." (Appt. Br. 61)

In Ginnis v. Mapes Hotel Corp., 470 P.2d 135, 140 (Nev. 1970), the court repudiated the very argument offered here, "that in accumulation, the judge's comments and conduct amounted to prejudicial error even though [the appellant] made no specific objection at trial." The Ginnis appellant asserted that the trial court repeatedly disparaged the credibility of expert witnesses, expressed impatience, "volunteered remarks having nothing to do with rulings," rebuffed counsel for trial tactics, remarked to a juror (while in the elevator) that the case was boring, and generally created the impression he was prejudiced against the appellant. Id. While not approving of the judge's conduct, the appellate court declined to rule on the prejudicial effect of the comments, "because the error was not preserved" for appeal by timely objection. Id. at 141.

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[37]The "comments" claims are lettered "D," "E," "I" and "P." (Appt. Br. 63-65, 68-69)

While nothing raised by Garner comes close to the court's alleged conduct in Ginnis, not only did the Garner appellants fail to object to the judge's comments when they were made at trial, but the appellants did not even deign to raise the "comments" in their motion for new trial or judgment n.o.v. Since Judge Frederick never heard a syllable of the present complaints, they should now be disregarded.

Furthermore review of the transcript will show that, in context, the district court's comments were very infrequent, non-prejudicial and judicially appropriate. Any curtain that dropped between the jury and the appellants was spun from their own yarn of deception.

2. No improper demeanor or error at trial can be inferred from Judge Frederick's post-trial expression of his view of the fraud evidence warranting punitive damages

Equally undeserving of individual treatment are the claims of error raised in "Q," "R" and "S." The appellants make a sort of "retroactive demeanor" argument by saying that the district court demonstrated it was "hostile" or "jaundiced" toward the appellants at trial, through the court's findings in the post-trial memorandum decision denying the appellants' new trial and or judgment n.o.v. motions.[38] (Appt. Br. 69; R. 6:2534)

The absurdity of the argument is clear since a trial court is expressly called upon to state its view of the sufficiency of the evidence when ruling on such post-trial motions. See W. Fiber-

[38]The Garner appellants neglect to point out that in each "Q-R-S" instance the trial court was articulating its grounds for concluding that the appellants had the requisite state of mind to justify punitive damages and that the damages were reasonable. (R. 6:2533-34)

glass, 789 P.2d at 35. Tellingly appellants cite no support and, indeed, there is none for the proposition that a judge's post-trial review of the evidence is an indication of his demeanor or conduct at trial. This Court's review of the district court's actions is limited to that excepted by specific timely objections taken at trial. Cf., Kotz, 758 P.2d at 465-66 (claim of error for purpose of reversing judgment too late if made for first time in motion for new trial or appellate brief). The remaining alphabetized claims of error are as frivolous as the "comments" and "demeanor" arguments.

3. The district court was correct in its evidentiary rulings and, in any event, none of them can possibly be reversible error.

The Garner appellants end their attack on the jury's unanimous fraud verdict in a spasm of inconsequence, which collapses under a cursory reading of the transcript. The standard of review for admissibility of evidence is stated as follows:

> We will not reverse a trial court's determination on the admissibility of evidence absent an abuse of discretion affecting a party's substantial rights. A substantial right of a party is affected if, viewing the evidence as a whole, there is reasonable likelihood a different result would have been reached absent the error.

Erickson v. Wasatch Manor, Inc., 802 P.2d 1323, 1325 (Utah Ct. App. 1990) (emphasis added) (citations omitted)).

There is no doubt that, considering the crushing evidence of the appellants' fraud, the verdict would not have been different had the district court decided any of the following evidentiary rulings in appellants' favor.[39]

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[39]Discussion of the evidentiary rulings will follow the lettering in the appellants' brief at 61-69.

A. The district court correctly excluded evidence that Alldredge attempted in May 1991 to list the mausoleum for sale after Ong International filed its complaint. (Tr. III:3299-3301) There is no merit to the appellants' contention that the evidence showed Ong International waived its demand for rescission, because it "exercised dominion" over the property. First, at that juncture, Ong International was merely attempting to mitigate damages[40]. (Tr. III:3300) Second, Ong International sued for both common law fraud and rescission predicated on fraud. (R. 1:2-18) Ong International was not required to and did not elect its rescission remedy until August 4, 1991 (R. 3:1208-10), well after it became apparent the property was unsalable.

Since the listings were wholly immaterial to Ong's entitlement to rescission based on fraud, that evidence was properly excluded as a waste of time and a confusion to the jury. Utah R. Evid. 403.

B. The district court properly determined that Roger Evans, the Salt Lake Director of Building and Housing Services, was not the right person to opine whether the SLMM could be licensed in its current plywood condition.

First, as the district court noted, it was a prospective witness, Richard Ith, who conducted all inspections of SLMM and revoked the business permit pending approval from the Utah Board of Health. (Tr. VI:3491) Second, the permit was held up by the Board of Health, and Evans was not employed by that agency. (Tr. VIII:4442)

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[40]The appellants' churlishness on this point is emphasized by the fact that instruction No. 44 places the burden on the Garner appellants to prove that Ong International did not make reasonable efforts to mitigate. (R. 5:1844) The jury is expressly asked to consider whether the wood crypts were marketable. Id.

C. Ord was properly prohibited from testifying why he thought plywood was good enough for the crypts, because, as the district court properly ruled, loyalist Ord's legendary lack of experience with crypt construction (see discussion supra at pp. 8-9) deprived his testimony of any foundation for that opinion. (Tr. IV:3549) See, e.g., Weber Basin Water Conservancy District v. Nelson, 358 P.2d 81, 83 (Utah 1961)

F. The district court properly sustained the objection to "bias and prejudice" questions asked of Nielson and Lenois, because the questions were far afield from the scope of direct examination.[41] (Tr. V:3785-96; VI:3946) At any rate, the district court's ruling is not fundamental to the case and would not warrant retrial. See Erickson, 802 P.2d at 1325.

H. The appellants' seriously understate the record in their contention the district court erred by allowing Garner's wife's tax returns to go to the jury. In a bench conference, the district court pointed out that Garner had several months' notice to separate his tax information from his wife's, but had not done so. (Tr. VII:4236) The court permitted a summary of the only tax information available to Ong, and told the appellants' counsel he could sort it out with Garner on direct. Id. The Garner appellants brought that ruling on themselves.

J. The district court properly granted Ong International's objection to allowing Mr. Schroeder to elaborate the "durability"

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[41]The Garner appellants mistakenly rely on State v. Leonard, 707 P.2d 650 (Utah 1985), a criminal case in which the defense counsel was not allowed to elicit from a key witness the fact that he turned state's evidence or to impeach him with previous damning testimony that went to the core of the case and was well within the scope of direct. Id. at 655.

of wood was proper, because he was totally ignorant of mausoleum or crypt construction. (Tr. VII:4253).

K. Mr. Reavely's testimony about the "workmanlike manner" in which the wood was piled was equally without foundation or materiality. He admitted to knowing nothing about mausoleum industry standards (Tr. VIII:4294) and had never constructed a crypt (Tr. VIII:4293).

L. The testimony of Mr. Landvatter (Garner's Temple Square and study group companion of 15 years) that Garner used the terms "bunker" and "solid concrete" to refer to the old indoor mausoleum (Tr. VIII:4304-05) is a red herring, because Mr. Nielson's testimony on that point was exactly the same (Tr. V:3765). The appellants conveniently omit Nielson's later testimony that Garner told him the outdoor crypts would "'meet or exceed the standards of the old building.'" (Tr. V:3771), and that there was no wood in the completed outdoor pavilion (Tr. Tr. V:3785). The appellants also omit the fact that Nielson twice renewed the mausoleum policy after Garner repeatedly reassured him all wood had been removed from the pavilion. (Tr. V:3781)

N. The district court did not err by allowing Ong International's counsel to refer to Utah law when asking Richards, Garner's attorney, whether the parties contemplated release of unknown fraud claims--even after Richards said he had not researched the issue. The district court correctly pointed out, the continued questioning was appropriate to determine whether Richards was aware of the issue even though he had not researched it. (Tr. VIII:4486) As discussed supra at p.36, Richards' testimony that release of fraud claims was never discussed is highly relevant to

the parties' intent upon entering the Redemption Agreement containing the release.

O. The district court properly allowed Ong International to prove Funk's bias by showing he had testified for Garner as an expert witness in four prior cases. 31A Am. Jur. 2d Expert and Opinion Evidence § 95, at 99 (1989) (footnotes deleted). There can be no question that, under Utah R. Evid. 403, the district court did not err by refusing to allow the appellants to trot out the facts of the four previous lawsuits. The result would have been wasted time, immateriality and jury confusion.

In sum, the appellants' petulant A-S contentions raise nothing to undermine this Court's confidence in the jury's unanimous verdict that Garner perpetrated grand fraud against Ong International.

VI. THE DISTRICT COURT CORRECTLY AWARDED COSTS.

The Garner appellants contend the district court erred in awarding Ong International costs of $12,260.75 representing deposition costs of $11,503.00, witness fees of $631.75, and a filing fee of $125.00.

It is undisputed that these fees are allowable. Utah R. Civ. P. 54(d); see, e.g., Lloyd's Unlimited, 753 P.2d at 512 (expenses of taking reasonably necessary depositions are taxable costs). "Depositions are generally allowed as necessary and reasonable 'where the development of the case is of such a complex nature'" that discovery cannot be had by less expensive means. Id. at 512 (emphasis added) (quoting Highland Construction Co. v. Union Pac. R.R., 683 P.2d 1042, 1051 (Utah Ct. App. 1988)).

Whether the claimant seeking costs has met its "necessary and reasonable" burden is within the "sound discretion" of the district court. Lloyds Unlimited, 753 P.2d at 512. "The [district] court's ruling on whether to award a party costs of depositions is presumed correct and will not be disturbed unless it is so unreasonable as to manifest a clear abuse of discretion."[42] Id. (emphasis added).

In considering the Garner appellants' motion to tax costs, the district court carefully reviewed the claimed costs and reduced them from $27,737.85 to $12,260.75. (R. 5:2074; 7:6465-66) The award included those depositions that were necessary to the development and presentation of the case, considering the scope of the wide-scaled fraud.

The Garner appellants' argument regarding excess fees to witnesses is miserly, as the "excess" amounts to less than $25.00.

Nothing raised by Garner rebuts the presumption of correctness as to the district court's supplemental judgment for costs.

CONCLUSION

This is a case in which manifest justice carried the day without error. For the reasons discussed herein the judgment on the verdict should be upheld and affirmed in all respects and the Garner appellants' appeal denied.

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[42]The Garner appellants incorrectly state that Lloyd's Unlimited, 753 P.2d at 1055, holds that costs for depositions not used at trial are not recoverable. That case says nothing of the sort. In fact Lloyd's Unlimited approves costs for the taking of depositions if they were taken in good faith and, "in light of the circumstances, appeared to be essential for the development and presentation of the case." Id. (emphasis added).

RESPECTFULLY SUBMITTED.

DATED this 29th day of June, 1992.

ROBERT S. CAMPBELL, JR.

CLARK W. SESSIONS
of and for
CAMPBELL MAACK & SESSIONS

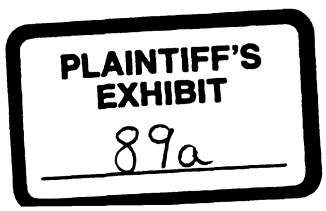
Attorneys for Plaintiffs-Appellees Ong International (U.S.A.) D&D Management and David L. Alldredge

Attachment 1

GRANT R. CALDWELL EXHIBIT

GARNER'S SAVINGS BY WOODEN CRYPT CONSTRUCTION

Cost to Construct Outdoor Concrete Crypts as of 1984 (Testimony of Arnold Fluckiger Exhibit P52)	$ 582,500
Actual Cost of Crypts To Garner and Salt Lake Memorial Mausoleum (Balance Sheet)	$ 173,400
Difference or Savings To Garner	**$ 409,100**



Attachment 2

CHURCH ASSIGNMENTS

Bishop of Menlo Park Ward, Menlo Park Stake	1952-63
Seminary teacher	1953-60 1969
High Councilman, Menlo Park Stake	1949-52 1963-65
President of Southern Far East Mission	1965-68
Mission Representative, Regional Representative	1969-75
President of Temple Square	1975-79
International Mission Counselor to Elder Carlos Asay and Elder James Faust	1978-82
Elevated to Gospel Doctrine and Home Teacher	1983-

Keith E. Garner
1001 Eleventh Avenue
Salt Lake City
Utah

EXPERIENCE RESUME

Principal - Keith E. Garner

Mr. Keith E. Garner has been in the commercial, residential, and industrial construction business as an owner/developer for over thirty (30) years in the San Francisco Bay area and in Salt Lake City, Utah. During this period of time, Mr. Garner has built and developed over eighty (80) million dollars worth of house sites, apartments, office buildings, motels, commercial buildings, condominiums, mini storage units, shopping centers industrial parks and resort complexes. All of the above were for his own account.

Mr. Garner's financial references are:

Sterling Harris
First Interstate Bank
Provo, Utah

Zions First National Bank
Richard Mouritsen
Tooele, Utah

Rhees Ririe, Senior Vice President
Commercial Security Bank
Salt Lake City, Utah

Wayne Hintze, Senior Vice President
Zions First National Bank
Salt Lake City, Utah

Marlan Andrus, Senior Vice President
First Security Bank
Salt Lake City, Utah

Glen Mowry, President
Pacific Union Bank
Menlo Park, California

Dee Tolles, Executive Vice Chairman
Union Bank
Palo Alto, California

Mr. Garner's personal references are:

Elder Marion D. Hanks
Salt Lake City, Utah

President Gordon B. Hinckley
Salt Lake City, Utah

Senator Orin Hatch
Washington D C

Elder James E. Faust
Salt Lake City, Utah

Elder Carlos Asay
Salt Lake City, Utah

Dr. Burtis Evans
Salt Lake City, Utah

Experience as follows:

1956 to December 31, 1958

Office Buildings in Palo Alto	2
Apartment Units	
Coleman Avenue	119
Hawthorne	5
Channing	15
Encinal Avenue	61
Redwood City	17
Alameda	4

Total Construction for this period: $2,500,000

January 1, 1959 to October 31, 1962

Houses - San Mateo Drive	3
Apartment Units	
Roble	17
Alice Lane	2
Woodland	8
Middle Avenue	18
Wilkie Way	32
Manhattan	20
Menlo Avenue	37
Alameda	55
Calderon	27
San Antonio	14
Arbor	12
Ventura	26
Gabilan	8
Ramona	23
Partridge	2
Oak Grove	14
Noel Drive	32
Webster	11
Emerson	4
Florence	7
Alma	11
Fremont	4
Waverly	5
Everett	4
University	8
College	18

Total Construction for this period: $6,500,000

October 31, 1962 to October 31, 1965

High Rise - Salt Lake City

Motels	64 units
Office Buildings - Menlo Park	2

Apartment Units

Sheridan	7
Ortega	4
Hobart	1
College	10
California	159
Tyndale	11
Fremont	11
Coleman	75
Latham	26
Laurel	17
Waverly	25
Ventura	39
Lundahl	1
Laune	17

Total Construction for this period: $9,420,000

October 31, 1965 to October 31, 1968

Office Buildings	5
Commercial Buildings	3
House	1

Apartment Units

Willow Road	46
Roble	14
Arlington	48

Total Construction for this period: $3,580,000

October 31, 1968 to October 31, 1970

Office Buildings	6
Houses	2
Motel	1
Apartment Units	
Miramonte	61
Escuela Avenue	422
Dana	145

Total Construction for this period: $8,919,195

October 31, 1970 to October 31, 1973

Office Building - Hamilton Avenue	1
Apartment Units	
McClellan Road	94
High-rise Condominium, Menlo Park	61
Frame condominium, Menlo Park	6
Frame condominium, St. George	63
Office Buildings - Crane	
Oak Grove	
Mini-Storage Units	
Mountain View	
San Carlos	
San Jose, Tully	
San Jose, O'Toole	

Total Construction for this period: $12,501,000

October 31, 1973 to December 1980

Mini Storage Units

Mountain View addition
Redwood City
Cupertino
San Jose, Tully #2
Milpitas
Salt Lake City

Condominiums

Olympus View, Salt Lake City
Dorius Apartments, Salt Lake City (conversion)

Office Buildings

McIntyre Building, Salt Lake City (conversion)
Felt Building, Salt Lake City
Aviation Club Building, Salt Lake City

Shopping Centers

Colonial Square, Bountiful
Carriage Square, Salt Lake City
Albertsons Center, Ogden
Harrison Depot, Ogden

Land Development

Sub-division, 166 lots, Park City

Park City Center

Convention Center Building
Recreation Building
Restaurant Building
Living units, 323 condominiums

Idaho Project

Convention Center Building
18 hole golf course
Living units, 114 condominiums

Total of Construction for this period: $35,099,000
Utah, California, Idaho projects

January 1981 to June 1986

Pinetop, Arizona Project

Purchase of eight acres in the White Mountains
of existing resort facilities zoned commercial,
remodel and new construction
42 units furnished
Restaurant
Sports center
Pool
Timeshare development with 2100 existing weeks,
fully improved and approved for 7500 additional
weeks

Total for this period: $4,000,000